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The Workmen's Compensation Law Journal

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts

William Otis Badger, Jr., Editor
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The Workmen's Compensation Law Journal

Volume IV *July, 1919* *No. 1*

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts.

SUPREME COURT OF ARIZONA.

ARIZONA EASTERN R. CO.

v.

MATTHEWS. (No. 1660.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"MANUAL LABOR"—"MECHANICAL LABOR."

A local bill clerk for a railroad is not engaged in "manual or mechanical labor" within Employers' Liability Act, par. 3156, although occasionally at other times than when injured he did manual labor in loading and unloading live stock and freight; "mechanical labor" being skilled labor employed in making and repairing tools and instruments, and "manual labor," under such paragraph, meaning actual physical contact with the dangerous instruments.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Manual Labor; Words and Phrases, Mechanical Labor.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW.

The phrase "caused by an accident due to a condition or conditions of such occupation," appearing in Const. art. 18, § 7, and in Employers' Liability Act, par. 3154, requires more than that accident arise out of and in the course of the employment, and an injury must have occurred while employee was at work in his occupation and it must have been occasioned by a risk or danger inherent in the occupation.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW.

Where a bill clerk at a railroad freighthouse was injured by falling into a scale pit being constructed by the railroad "along the route usually traveled by himself and others having business in and about defendant's freight depot" while such bill clerk was returning from midnight lunch, the injury was not one "caused by an accident due to a condition or conditions" of his occupation, although it may have arisen out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

*Decision rendered, April 16, 1919. 180 Pac. Rep. 159.

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7. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—CONSTITUTIONALITY.

The Legislature, in passing the Employers' Liability Act, did not violate Const. art. 18, § 7, or act beyond authority granted thereby in limiting the application of the act to the injured employee engaged in "manual and mechanical labor."

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by J. A. Matthews against the Arizona Eastern Railroad Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

G. P. Bullard, of Phœnix, for appellant.

Hawkins & Anderson, of Phœnix, for appellee.

Ross, J. Appellee sued the appellant railroad company for damages for personal injury. Omitting formal parts, the complaint is as follows:

"III. That on or about April 5, 1916, defendant was by its servants and employees engaged in installing platform scales on a platform of defendant's freight depot located in the city of Phœnix, Ariz.; that the work was not finished on that day, but by night of said day the work had progressed to such an extent that about eight square feet of said flooring of said depot platform had been removed and that said platform floor was about five feet from the ground, and when said flooring had been removed a pit was formed about eight feet wide, eight feet long, and five feet deep.

"IV. Plaintiff says that defendant left said pit thus formed as above stated during the night of April 5, 1916, unlighted, uncovered, unfenced, and otherwise unprotected at a place, vicinity, and time where and when its employees, and particularly this plaintiff, were required by defendant to work in and about said premises, and that the night of April 5, 1916, was quite dark.

"V. That on the night of April 5, 1916, plaintiff was in the course of his employment compelled to work all night for defendant at defendant's freight depot aforesaid, at manual labor as bill clerk, and that while so engaged at such manual labor between 4 and 5 o'clock a. m. of April 6th * * * he became so fatigued and hungry that it was necessary for him to have something to eat and some coffee, * * * and, in order to secure the same, he went to a nearby restaurant and then and there procured such refreshment and immediately started to return to such manual labor as such bill clerk for defendant, along the route usually traveled by plaintiff and others having business in and about defendant's freight depot, and that while so returning to his said work, and while at all times exercising due care and acting without negligence on his part, plaintiff stepped in said pit so left by defendant without any warning light or any kind of protection therefrom, and fell to the bottom of said pit, a distance of about five feet, * * * and was injured," etc.

Appellant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action; also, on the ground that the Employers' Liability Law (Civ Code 1913, pars. 3098-3179) is unconstitutional in that it violates the Fourteenth Amendment to the federal Constitution. It answered by general denial, pleaded contributory negligence and assumed risk and also raised the question of the constitutionality of the Liability Law.

At the close of the appellee's case in chief, the appellant moved the court to require him to elect whether he would ask a recovery under the Employers' Liability Act or under the common law. Whereupon, appellee announced (without any ruling of the court) his election to recover

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under the Employers' Act. Appellant then made the following motion:

"We desire to make a formal motion to instruct for the defendant upon the ground that the state Employers' Liability Act applies to those engaged in the operation of a railroad, to those engaged in manual and mechanical labor, and that the uncontradicted evidence in this case shows that on the night in question, upon which it is claimed that plaintiff was injured, he was not engaged in any mechanical or manual labor and was not engaged to any extent in the operation of a railroad."

The motion being denied, appellant introduced its evidence, and, the case being submitted to the jury, it returned a verdict in favor of appellee for the sum of $3,000. The appeal is prosecuted from the order overruling motion for a new trial and from the judgment. The assignments of error are numerous—28 in number—but it will not be necessary, from the view we take of the matter, to pass upon all of them.

The first assignment is based upon the ruling of the court in denying the motion for an instructed verdict. The evidence at the time of making the motion and at the close of the entire case was in confirmation of the allegations of the complaint that appellee was a bill clerk in the employ of appellant at its freight depot in the city of Phœnix. The appellee describes the nature and character of his work as follows:

"On or about April 5, 1916, I was employed as bill clerk for the Arizona Eastern Railroad Company, working at the local freight office situated between First avenue and Center street. My work was in the office, which is located in the west end of the building. My duties were billing freight, writing up the transfer book, making up tonnage reports, balancing the cashbooks, making an abstract, loading and unloading live stock, and sprinkling down hogs during warm weather. * * *

"We sometimes had loading and inspection of live stock at the freight-house platform, but the bulk of it was at the union stockyards, located about 13 blocks west of the freight office, and in the yards of the Arizona Eastern, 12 blocks east of the freight office.

"I have been required to go out and inspect stock after it was loaded. I have used this platform at night in loading live stock, and in loading automobiles and all kinds of freight. * * * I never loaded any stock myself, but I had to make a live stock report and an inspection of them. They were loaded by the shipper from this platform.

"I don't do manual labor. I don't do manual labor at all when I was working for the Arizona Eastern. I was doing clerical work.

"It was my duty to go out and check in the loading of the stock.

"Between the time I went to work at half past 5 on the evening of the 5th and the time when I was injured on the morning of the 6th, my duties were the regular duties of the office, billing and writing transfers and making abstracts, and that is all I now recall that I did between the hour I went to work and the hour I was injured. I was not handling any stock that night. The duties I refer to were clerical that night."

[1, 2] Keeping this evidence in mind, as also the allegations of the complaint as to the character of the work appellee was engaged in, we now turn to the Employers' Liability Act to see if he generally, or at the time of his injury, was embraced within its terms so as to entitled him to maintain an action thereunder for damages or compensation. If the cause of action set out in his complaint and the evidence on the trial do not bring the appellee within the terms of the Employers' Lialibity Act, he ought not to be permitted to recover upon his election.

The constitutional mandate contained in section 7, art. 18, is that the Legislature enact a law to make the employer liable for injuries to employees in hazardous occupations when the accident causing the injury is due to a condition or conditions of such hazardous occupation, and is not caused by the negligence of the employee; said law so to be enacted to apply to "all hazardous occupations in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry."

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Chapter 6, tit. 14, being paragraphs 3153 to 3162, inclusive, Civil Code of 1913, is the legislative effort to comply with the mandate of the Constitution. Hereafter we will refer to it as the "Liability Act."

This Liability Act has declared and determined in paragraph 3156 certain occupations in the named industries to be hazardous, and paragraph 3155 extends the benefits of the act only to those employees engaged in manual and mechanical labor.

Among other things, it is contended by appellant that appellee was not (1) employed in an occupation declared and determined to be hazardous, nor (2) engaged in manual or mechanical labor. As to the first point made, if appellee is to receive the benefits of the act, his occupation must be one of those enumerated in subdivision 1 of section 3156, which reads as follows:

"(1) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated."

The arguments of both sides are directed to the first division of the subsection, it being the contention of appellant that appellee was not engaged in an occupation in "the operation of a railroad." Whereas appellee contends that a bill clerk's occupation is essential to the proper operation of a railroad and is within the occupations declared to be hazardous in the operation of appellant's railroad. We will not go into this question further than to say that, as we understand the law, those persons engaged in "the operation of a railroad" are persons who have an actual physical connection with the handling, organizing, loading, unloading, and movement of trains, locomotives, engines, motors, and cars, extending sometimes to section men. Jemming v. Great Northern Ry. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696; Callahan v. Ry. Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746; 20 Cyc. 1370. It includes those whose occupations subject them to hazards and dangers incident to and inherent in the physical part of the operation of the railroad, and not those who perform services essential to the railroad business but not in its actual operation.

It may be that appellee's occupation falls within those named in subsection 1 as "including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated." If the freight depot and platform, in which was the opening that appellee fell into was a plant "by which the railway business" of appellant was in part operated and the appellee was not without the line of his duty when using the platform as a way of returning to his work, we submit, without so deciding, that his occupation might be one of those intended to be declared and determined as hazardous by the statute. As this question was not presented to us in brief or argument, and as its decision is not necessary, as we view the case, we only suggest it, for if it be granted that, he was in the use of a plant of appellant at the time of his injury, and that his occupation was hazardous, still he was not engaged in manual or mechanical labor.

Aside from the context, it is easy to determine that appellee, in the occupation of "billing freight, writing up the transfer book, making up tonnage reports, balancing the cashbooks, making an abstract, * * * " was not engaged in mechanical labor. The definition of "mechanical," as given by Webster, is:

"1. Of or pertaining to or concerned with manual labor; engaged in manual labor; of the artisan class. 2. Of, pertaining to or concerned with machinery or mechanism; made or performed by machinery or with tools."

"Mechanical labor" is labor performed by a mechanic or "one who

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practices any mechanic art; one skilled or employed in shaping or uniting materials, as wood materials, etc., into any kind of structure, machine or other object requiring the use of tools or other objects, an artisan." Webster.

Taken in connection with the context, we think "mechanical labor" is such skilled labor as is necessarily employed by employers in making and repairing tools and instruments used in the operation of the business. It is manual labor, but of the skilled kind.

While the words "manual labor" might be construed to mean clerical work, we do not think any such meaning attaches to them as they are used in the context. In the first place, the hazardous occupations in mining, smelting, manufacturing, railroading, and other industries named as hazardous, exclude the idea of the office man's occupation. They are those occupations engaged: (1) In the operation of railroads, in the construction, use, and repair of machinery, etc, by which the business of railroading is carried on; (2) the use of gunpowder, etc., (3) erection and demolition of buildings, etc., (4) the operation of elevators, etc., (5) work on ladders, etc.; (6) work in connection with electricity; (7) work on telegraph and telephone lines; (8) work in or about quarries, open pits, open cuts, mines, reduction works, and smelters; (9) tunnel work; and (10) work in mills, etc., operated by steam, electricity, or other mechanical power. Paragraph 3156.

Labor in any of the named occupations must mean actual physical contact with the dangerous instruments and means used in carrying on the business. One of the canons of interpretation of words used in a statute is that they must be taken in their common and ordinary sense, unless, from the context, it is evident some other meaning was intended. When we speak of a person doing manual labor, the mind is instantly directed to some kind of toil in which the physical predominates the mental. The words would never call to mind the office man engaged in keeping books or making out bills or statements or operating a typewriter. Even if appellee did occasionally, as an incident in his occupation as bill clerk, do manual labor in the loading and unloading of live stock and freight, it is enough to say he was not injured by any accident while so engaged. At the time of his injury, his sole occupation was that of a bill clerk. So we conclude appellee was not, at the time of the accident in which he was injured, engaged in manual or mechanical labor, and therefore is not entitled to the benefits of the Employers' Liability Act.

[3] The meaning of the phrase "caused by any accident due to a condition or conditions of such occupation," appearing first in the Constitution (section 7, art 18), and next in the Liability Act (paragraph 3154), as descriptive of the kind of accident intended to give rise to a right of action to an injured employee, has not as yet been construed by the court. The expression is original in our Constitution and laws. We have not been able to find it in any of the compensation or liability laws or in any decision of a court, or in any text-book, and it therefore necessarily follows that it has not been defined or applied. It is evident that the accident must arise out of and also be inherent in the occupation itself; the condition or conditions that produce the accident must inhere in the occupation. If the occupation is nonhazardous, if the condition or conditions inherent therein are innocuous, the occupation and the employee therein are outside of the purview of the Constitution and likewise of the Liability Law. The Legislature, in paragraph 3155, has defined the kind of accident intended by it to be covered by the Employers' Liability Act in the following language:

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

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It will be noted that stress in this definition is placed upon "the means used and provided for doing the work in said occupation." In fact, the dangerous "nature and condition" of the occupation is not alone because of the work, but because of the lethal character of the means employed to do the work required of the employee. The nature and conditions of the occupation, and the means used and provided to do the work therein, are so dangerous and the risks therefrom are so inherent as that accident therefrom is "unavoidable by the workmen therein." It would seem that, before an employee may recover for injury under this act, it must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation.

Our statute (paragraph 3158) requires something more than that the "accident arise out of and in the course of the employment," an expression common to most of the liability and compensation laws; our statute being:

"When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment."

These added words to the common expression must mean something. The words "arising out of" have been construed to refer to the origin or cause of the injury, and the words "in the course of," to refer to the time, place, and circumstances under which it occurred. Workmen's Compensation Acts, p. 72, Corpus Juris. Superadded to these under our Liability Act is the requirement that the injury must have occurred in the "work," "labor, service and employment" and be "due to a condition or conditions of such occupation." The act of appellee in going away from his work for refreshments was, it may be granted, proper and necessary; but it is also equally as apparent that during the time of his absence he was not rendering work, service, or labor for appellant, and therefore the injury he sustained while on such errand was not due to a condition or conditions of his occupation. Under our statute, the work must be hazardous, and the injury must have been incurred because of the hazard or danger in the work itself and, because of said hazard, "unavoidable" on the part of the employee. Calumet & Arizona Mining Co. v. Chambers, 20 Ariz.—, 176 Pac. 839.

[4] The danger of falling into the scale pit was not peculiar to appellee in his occupation of bill clerk. It was a danger to which persons not employees of appellant were exposed as much as those engaged in the service of appellant. Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was "along the route usually traveled by himself and others having business in and about defendant's freight depot." This being so, it was not a risk or hazard peculiar to his work, but one "common to the neighborhood" In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A. 306.

If it be concluded that appellee received his injury in the course of his employment, and that it arose out of the employment, that is not enough to bring him within the statute unless at the time of the injury he was engaged in one of the hazardous occupations named by the statute. The rule being, as laid down by the courts of New York, where the occupation as here must be hazardous, that—

"Where * * * the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so employed when he met with injury, he is not en-

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titled to reimbursement under the statute, even though he at times did work embraced within the statue." Gleisner v. Gross & Herbener, 170 App. Div. 41, 155 N. Y. Supp. 946, 949; De Voe v. New York Sate Ry., 169 App. Div. 472, 155 N. Y. Supp. 12.

[5] Appellee contends we ought to ignore paragraph 3155 as though it were not written in our laws, and especially would he have us ignore the provision therein that limits the benefits of the act to employees doing manual and mechanical labor; for, he says, the constitutional direction to the Legislature was to enact a law granting the right of action to every employee without restriction other than that his occupation be hazardous and in one of the industries mentioned. Without so deciding we may suggest that the Constitution itself in spirit and by implication, if not in terms, by providing that the benefits shall be made to extend only to those employees engaged in hazardous occupations in the businesses or industries mentioned, placed the limitation contained in the law and of which complaint is made. For is it not a fact that the hazardous occupations in the industries of mining, smelting, manufacturing, and railroad transportation are all of the kind requiring manual or mechanical labor? But, aside from this suggestion, it is the statute law and not the Constitution that gives the right of action. Section 7, art. 18, of the Constitution, is not self-executing, and the principle therein contained can be appropriated and applied only in so far as the Legislature provides for it. Insp. Cons. Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 1183; 12 C. J. 730, 739, 741.

[6-8] The delition of paragraph 3155, or any part thereof, as appellee asks, would be to disregard one of the cardinals rules of construction stated by Judge Cooley, as follows:

"That effect is to be given, if possible, to the whole instrument and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if possible, and must lean in favor of a construction which will render every word operative rather than one which may make some words idle and nugatory." Cooley's Const. Lim. (5th Ed.) p. 70.

But it is said by appellee that this court in Deyo v. Ariz. Grading Co., 18 Ariz. 149, 157 Pac. 371, L. R. A. 1916E, 1257, decided that the Legislature, in limiting the benefits of the Employers' Liability Act to employees doing manual and mechanical labor, acted without power. What we said in that regard was not necessary to a decision of the case, and shows upon its face that it was not intended as a statement of the law. It was submitted more as a query. We said:

"Whether the Legislature exceeded its authority and power in restricting the beneficiaries of the law to those engaged in manual and mechanical labor only, we do not deem it necessary to determine under the facts of this case. That question was not presented in argument by counsel; but it appears to be within the reason of the rule laid down by this court in Behringer v. Insp. Cons. Copper Co., 17 Ariz. 232, 149 Pac. 1065, in which we held that the Legislature did not possess the power to enlarge the mandate of the Constitution as to the Workmen's Compulsory Compensation Law."

Anything said in that regard in the Deyo Case was tentative, and, upon reflection, we conclude unsupported by reason. If we had said, instead of what we did say, that it was the duty of the Legislature to observe the mandate of the Constitution and make its legislation conform thereto, our statement would have been more in place and more correct in principle. While the Legislature may not extend the constitutional provision so as to include subjects not within its purview or that conflict with it (Behringer v. Insp. Cons. Copper Co., supra), it is well settled that the lawmaking body may or may not, as it chooses, pass laws putting into effect a constitutional provision, and if, in its efforts to give effect to a constitutional provision, the statute is not broad and comprehensive enough to cover all subjects that it might, we know of no reason why it should not be valid as far as it goes. So it is that, if other employees

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than those doing manual and mechanical labor might, under the Constitution, be granted the benefits of the act, it is the duty of the Legislature to so provide, and, until it does so, the beneficiaries are limited to those mentioned in the statute.

[9] Inasmuch as the judgment will have to be reversed and the case remanded to the trial court, there is a question involving the introduction of evidence that we feel should be settled at this time. Appellant offered as witnesses two physicians who rendered professional services to appellee, and wanted to prove by them what they discovered or learned of his condition, insisting that appellee had raised the ban of secrecy because in a previous trial he had examined one of the witnesses in regard to the same subject-matter and had permitted the other to testify without objection. This offered testimony, upon objection that it was confidential, was rejected. This ruling is assigned as error. Our statute (subdivision 6, par. 1677, Civil Code) in regard to the privileged character of information contained in his professional capacity by a physician or surgeon, from or of his patient, is peculiar, and, for that reason, the decisions of courts under statutes whose language is not the same, but widely different, would not greatly aid us in a construction of ours.

In Arizona & New Mexico Ry. Co. v. Clark, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834, it is said:

"The express object [of subdivision 6, supra] is to exclude the physician's testimony, at the patient's option, respecting knowledge gained at the bedside, in view of the very delicate and confidential nature of the relation between the parties."

And "it contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent."

It is further said:

"The act gives him [patient] the option of excluding the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment."

If the record shows that appellee, in the former trial or in the present one testified voluntarily as to what he "told the physician with reference to his ailment," it has not been pointed out to us. It seems, under the statute and the construction given it in the Clark Case, the patient can object to the physician testifying as to what he may have learned in his professional capacity unless the patient has himself "testified to the communications he made to the physician." It not appearing that appellee testified to any communication made by him to the physicians, he did not waive his right to object to their testifying at the second trial, even though they did at some previous trial testify as to knowledge obtained by personal examination.

In Dahlquist v. Denver & R. G. R. Co. (Utah) 174 Pac. 833, reading at page 845, the Supreme Court of Utah, speaking of the Clark Case, said:

"Just how the appellant in that case, under the plain words of the statute and the testimony of the plaintiff, could assume that the plaintiff, who had not testified to any communication made to his physician, had waived his privilege, is beyond our comprehension. The statute mentions one instance in which the patient's consent may be implied, namely, where he voluntarily testifies with reference to communications to his physician. By construction all others are excluded. Expressio unius est exclusio alterius."

Even if we questioned the correctness of the construction placed upon our statute, we would be inclined to defer our judgment to that of the highest federal court for the sake of uniformity in the administration of the law in this state.

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"We think the sounder view is that the mere fact that testimony has been given at a former trial does not necessarily constitute a waiver which is irrevocable at a subsequent trial of the cause. In this view of the matter, we are influenced not only by what seems to us to be the better reason, but by the well-considered opinions of other courts. Briesenmeister v. Supreme Lodge Knights of Pythias, 81 Mich. 525, 45 N. W. 977; Burgess v. Sims Drug Co., 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359.

"In the Iowa Case cited above, Mr. Justice McClain, speaking for the court, said:

"'As to the testimony at the former trial, it seems to us that the waiver resulting therefrom should be confined to the trial in which the waiver is made. Our statute relates to the giving of testimony, not to the publication in general of the privileged matter, and it seems to us clear that any waiver resulting from the giving or introduction of testimony on a trial should be limited to that trial.'

"In the same case, the court, in declining to follow the New York cases, said:

"'We do not agree to the reasoning in that case, which would seem to lead to the result that, if the privileged communication is in any way made public by the patient, the privilege is waived for all time; whereas, we understand to be well settled that a communication to a third person by the patient or client will not be a waiver of the right to insist on the privilege when it is sought to have the disclosure made by the way of testimony in open court.'"

Md. Casualty Co. v. Maloney, 119 Ark. 434, 178 S. W. 387-389, L. R. A. 1916A, 519.

The instructions given to the jury are the ordinary instructions given in personal injury cases arising under the common law—as to negligence, contributory negligence, assumed risk, and safe place to work—and we would feel constrained to affirm the judgment but for the fact that, commingled with those instructions, are others submitting the issues under the Employers Liability Act. These last instructions, under the pleadings and the evidence, should not have been given.

There are other assignments of error; but, as they do not go to the merits of the case and are not likely to occur upon another trial, we will not notice them.

The judgment is reversed, and case remanded, with directions that further proceedings be had in accordance herewith.

Cunningham, C. J., and Baker, J., concur.

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DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 2.

HALL

v.

SOUTHERN PAC. CO. ET AL. (Civ. 2705.)*

1. PARTIES—PARTIES INTERESTED IN ACTION AGAINST PARTY CAUSING INJURY TO SERVANT RECEIVING AWARD UNDER COMPENSATION ACT.

An injured employee, having made a claim and received an award under the Workmen's Compensation Act, may, in view of section 31 thereof and Code Civ. Proc. § 378, be joined as a party plaintiff, he having an interest, with his employer, or the latter's insurance carrier, in a suit against a third party whose tort has caused the injury.

(For other cases, see Parties, Dec. Dig. § 6[2].)

2. PARTIES—JOINDER—ACTION AGAINST PARTY CAUSING SERVANT'S INJURY—MAKING MASTER DEFENDANT ON REFUSAL TO JOIN AS PLAINTIFF.

Where an employer, after an award under the Workmen's Compensation Act, refuses to join the servant as a party plaintiff against the third party whose tort caused the injury, the servant may maintain the action alone by making the employer one of the defendants, in view of Code Civ. Proc. § 382, providing that, where one should be enjoined as a plaintiff refuses to consent thereto, he may be made a defendant.

(For other cases, see Parties, Dec. Dig. § 35.)

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Betty T. Hall, individually and as guardian ad litem of Frederick William Hall, against the Southern Pacific Company and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Keyes & Erskine, of San Francisco, for appellants.

A. L. Clark and Henley C. Booth, both of San Francisco, for respondent Southern Pacific Co.

Edwin T. Cooper and H. K. Eells, both of San Francisco, for respondent Healy-Tibbitts Const. Co.

HAVEN, L. This action was brought to recover damages for the death of Lucius Endicott Hall, Jr., which is alleged to have been caused by the negligence of the defendant Healy-Tibbitts Construction Company. Plaintiffs are the surviving widow and minor child of said deceased. At the time of the accident which caused his death the deceased was employed by the defendant Southern Pacific Company as a pile inspector and construction engineer, and was performing services growing out of and incidental to to such employment. After his death the plaintiffs filed a lawful claim against the defendant Southern Pacific Company for compensation for such death under the provisions of the Workmen's Compensation, Insurance and Safety Act (Stats. 1913, p. 279). Upon

* Decision rendered, Feb. 21, 1919. Rehearing denied by Supreme Court April 21, 1919. 180 Pac Rep. 20.

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that claim the Industrial Accident Commission made an award in favor of the plaintiffs and against the defendant Southern Pacific Company, requiring payment by that company to plaintiffs of compensation in weekly installments; the total liability of the said defendant upon such award being $5,100. After the making of such award, the plaintiffs requested the defendant Southern Pacific Company to commence an action against the defendant Healy-Tibbitts Construction Company to recover damages for the death of said deceased, with the further request that the excess of any amount which might be recovered in such suit, over the liability of the defendant Southern Pacific Company to plaintiffs under the award, be paid to plaintiffs. The said defendant Southern Pacific Company refused to bring such action, whereupon this action was brought by plaintiffs, and the Southern Pacific Company was joined as a party defendant. The prayer is for judgment for the sum of $50,000 "in favor of the Southern Pacific Company, for the use of the plaintiffs."

[1] To plaintiffs' complaint, alleging substantially the above recited facts, the defendants filed separate demurrers, both of which were sustained. Plaintiffs declining to amend, judgment was entered against, them from which they appeal. The sole question presented is whether or not plaintiffs can maintain this action against a third party, whose negligence is alleged to have caused the death, after having made claim against the employer of the deceased for compensation under the provisions of the Workmen's Compensation Act, and received an award on such claim.

The answer to that question depends on the proper construction to be given to section 31 of the act referred to, which, as far as is here material, reads as follows:

"The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party, * * * but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee or other person entitled."

In the case of Marcel Bassot and Ocean Accident & Guarantee Corporation v. United Railroads of San Francisco, recently decided by division 1 of this court, suit was brought by an injured employee and his employer's insurance carrier jointly against the defendant corporation to recover damages caused by the latter's alleged negligence. The compensation due the employee under the Workmen's Compensation Act had been adjusted and paid by the insurance company; after which both joined as plaintiffs against the third party whose negligence was alleged to have been the cause of the injuries received. A motion for nonsuit was granted as against the plaintiff employee on the ground that he was improperly joined as a party plaintiff. The case was twice heard in the District Court of Appeal, and in both opinions the granting of such nonsuit was held to have been erroneous. In the decision on rehearing the court, in referring to section 31 of the above act, and adopting the language of the original opinion, says:

"Respondent is correct in its contention that this section operates to transfer the legal title to the claim for damages to the employer or his surety, but it is also true that the employee still retains an equitable interest therein as to any surplus that may be recovered over the amount paid him by the employer, and he is therefore a real party in interest in the litigation. Although section 369 of the Code of Civil Procedure provides that 'a trustee of an express trust may sue without joining the person for whose benefit the action is prosecuted,' section 378

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of that Code provides that 'all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where otherwise provided in this title.' There is ample authority in this state to the effect that the provisions of section 369 are permissive only, and that the beneficiary of the trust may properly be joined as a party plaintiff with the trustee by virtue of section 378. Daley v. Cunningham, 60 Cal. 530; Cerf v. Ashley, 68 Cal. 419, 9 Pac. 658. It therefore follows that, while Bassot was not a necessary party to the suit, he was at all events a proper party thereto, and that the lower court was in error in granting the motion for a nonsuit and dismissing the action as to him." 26 Cal. App. Dec. 1003, on rehearing 177 Pac. 884.

A petition to have the above case heard and determined by the Supreme Court, after judgment in this court, was denied by the Supreme Court on January 30, 1919. We are in entire accord with the construction of the statute announced in the above case. If we were not, we should be bound to consider that the opinions referred to, and the refusal of the Supreme Court to disturb the same, establish the law in this state to the effect that an injured employee, after having made claim and received an award under the Workmen's Compensation Act, may join as a party plaintiff with his employer, or the latter's insurance carrier, in a suit against a third party whose tort has caused the injury complained of.

[2] The only remaining question in this case is whether, upon the refusal of the employer to join as plaintiff in such a suit, the injured employee, or the heirs at law of a deceased employee, may maintain the action alone by joining the employer as a defendant. If such power does not exist, the right of the injured employee or the heirs of the deceased employee, to protect their equitable interest in the surplus that may be recovered for their benefit, can easily be destroyed by the refusal of the employer to join as plaintiff. In such event, the plaintiffs in this action, having an established right to sue, would be denied that right by reason of the refusal of their trustee to protect their interests. The necessity of preventing such a denial of justice on broader grounds is obviated by the provisions of section 382 of the Code of Civil Procedure:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.

Plaintiffs complied with this section and, by virtue of its provisions, are entitled to maintain the action as sole plaintiffs.

The judgment must be reversed, with instructions to the trial court to overrule the demurrers to plaintiffs' complaint; and it is so ordered.

We concur: Langdon, P. J.; Brittain, J.

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SUPREME COURT OF COLORADO.

OCEAN ACCIDENT & GUARANTY CORPORATION, Ltd. ET AL.

v.

PALLARO ET AL. (No. 9510.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURIES "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

A mine watchman's death caused by explosion in blasting stumps for purpose of obtaining fuel for the cabin furnished by employer *held* to be due to accident arising "out of and in course of employment," within Laws 1915, c. 179, § 8 p. 522, as amended by Laws 1917, c. 155, § 4.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DEFENSES—NEGLIGENCE OF EMPLOYEE.

In proceedings under Workmen's Compensation Act for compensation for death of employee while blasting with dynamite in course of his employment, it is no defense that employee was negligent in the use of the explosives.

(For other cases, see Master and Servant, Dec. Dig. § 378.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COURSE OF EMPLOYMENT—NEGLIGENCE.

Negligence, in itself, does not prevent any act ordinarily incident to employment from being one performed out of and in course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —WILLFUL MISCONDUCT.

Where blasted stumps constituted cheapest fuel to be secured, and it was customary to obtain fuel in such manner, and mine watchman, who was required to obtain own fuel, had not been instructed not to use explosives, was killed while blasting stumps for fuel, he was not guilty of such recklessness as to amount to willful misconduct.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

En Banc.
Error to District Court, Clear Creek County; Harry S. Class, Judge.

Proceedings under the Workmen's Compensation Act by Mary Pallaro and others for compensation for death of Fred Pallaro, opposed by the Broderick Mining & Milling Company, employer, and the Ocean Accident & Guaranty Corporation, Limited, insurance carrier. Award by Industrial Commission to claimants, and employer and insurance carrier brought action to vacate findings and award of commission. Findings and award confirmed, and employer and insurance carrer bring error. Affirmed.

*Decision rendered, April 7, 1919. 180 Pac. Rep. 95.

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Chas. W. O'Donnell, of Denver, for plaintiffs in error.
J. W. B. Smith, of Idaho Springs, for defendants in error.

ALLEN, J. This action is one which arose from proceedings brought before the Industrial Commission of Colorado upon the claim of one Mary Pallaro for compensation under the Workmen's Compensation Act of Colorado (Laws 1915, c. 179). The claim was made and filed on behalf of the dependents, being the widow and the children, of one Fred Pallaro, who had been killed, as the result of an accident, while in the employ of the Broderick Mining & Milling Company. Upon a hearing, in this matter, the Industrial Commission made its findings and award, and granted compensation to the claimants. Thereafter an action was commenced in the district court of Clear Creek county by the abovenamed company, which had been the employer of the deceased workman, and the Ocean Accident & Guaranty Corporation, Limited, the insurance carrier for the Broderick Company, to vacate the findings and award of the commission on the ground that the same is unlawful. The district court confirmed the findings and award of the Industrial Commission. The employer and the insurer, above named, bring the cause here for review.

The main question to be determined by this court upon this review is whether or not the admitted facts in the instant case, showing the circumstances under which Fred Pallaro met his death, are such that it should be held, as a conclusion of law, and as the Industrial Commission found, that he "was killed by an accident arising out of and in the course of his employment." The materiality of this question arises from the provisions of section 8, c. 179, p. 522, Laws of 1915, as amended by section 4, c. 155, Laws of 1917, which reads as follows:

"The right of the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury or death accidentally sustained on and after August 1, 1915, shall obtain in all cases where the following conditions occur:

"(1) Where, at the time of the accident, both employer and employee are subject to the provisions of this act; and where the employer has complied with the provisions thereof regarding insurance.

"(2) Where, at the time of the accident, the employee is performing service arising out of and in the course of his employment.

"(3) Where the injury is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted."

The contention of the plaintiffs in error is, in effect, that, under the undisputed facts in the case, it cannot be said, as a matter of law, that, at the time of the accident, Pallaro was performing service arising out of and in the course of his employment, or that the accident was one so arising.

At and prior to the time of the accident which caused his death, Fred Pallaro was employed by the Broderick Mining & Milling Company as a watchman on its premises at the Lamertine mine in Clear Creek county. As such watchman, it was his duty to reside on the premises, and to stay thereon during all hours of the day. The company furnished for his use a cabin, equipped with bedding and a cooking stove. Neither coal nor any other fuel, either for heating or cooking purposes, was supplied by the company, and it was necessary for Pallaro to obtain his own fuel. The immediate surroundings of the cabin furnished no loose wood, in the shape of logs or limbs, that could be used to heat the cabin or cook his food. The premises were situated at an altitude of 10,500 feet above sea level. It was undoubtedly necessary for Pallaro to be supplied with fuel at all times. The only loose timber available was some 600 or 700 yards from the company's premises, and to secure that would require Pallaro to absent himself from the property which he was required to guard continu-

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ously. The ground on the premises was covered by spruce or pine stumps, composed of solid matter, and constituting good fuel. Pallaro was blasting some of these stumps with dynamite for the purpose of securing his fuel, at the time he met with the accident causing his death. The accident resulted from the use of the explosives, Pallaro being struck upon the head by a piece of flying wood.

[1] In view of the foregoing facts and circumstances, it cannot be reasonably doubted, in the instant case, that procuring fuel in order to protect himself from cold, or for cooking purposes, was an incident of Pallaro's employment. The act of procuring fuel was ultimately for the benefit of the employer. In the language of the opinion in Northwestern Iron Co. v. Industrial Com., 160 Wis. 637, 152 N. W. 416:

"To protect himself from undue and unnecessary exposure to the cold was a duty he owed his master as well as himself."

Procuring fuel was, under the existi g circumstances, "arising out of and in the course of the employment." Compensation cannot be defeated by the mere fact that Pallaro was killed while procuring fuel. In this connection, the law is as stated in 1 Honnold on Workmen's Compensation, p. 381, § 111, as follows:

"Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure a drink, refreshments, food, or fresh air, or to rest in the shade."

The author cites numerous sustaining cases. The foregoing extract is approvingly quoted in Haller v. City of Lansing, 195 Mich. 753, 162 N. W. 335, 337, L. R. A. 1917E, 324.

It only remains to be seen whether or not there were any circumstances, surrounding the accident, which preclude the operation of the rule announced in the above quotation from Honnold, or which requires us to hold that the accident did not arise "in the course of the employment."

[2, 3] Assuming, without conceding or deciding, that Pallaro was guilty of negligence in using explosives instead of employing some other means of obtaining loose pieces of wood from stumps, such negligence does not defeat a recovery of compensation. Section 8 of the act, hereinbefore quoted, enumerates the conditions which must occur and exist in order to give the right to compensation, and freedom from negligence, on the part of the employee, is not included. Negligence is therefore no defense. Neither does negligence, in itself, prevent any act, ordinarily incident to the employment, from being one performed out of and in the course of the employment. In 1 Honnold on Workmen's Compensation, p. 388, § 112, the author says:

"A peril which arises from the negligent or reckless manner in which he does the work which he is employed to do may well, and in most cases rightly, be held to be a risk incidental to the employment."

The grounds upon which compensation has been denied, in cases of this kind, are referred to in Haller v. City of Lansing, supra, where the court said:

"From an examination of cases * * * in which it has been held that an employee injured on the premises of his employer during the noon hour or other temporary suspension of work was not under the act, we

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think it manifest that the controlling reason for denying an award in those cases rests upon the proven facts that the employee broke the so-called nexus between workman and employer by some manifestly reckless and unreasonable hazard, amounting to intentional and willful misconduct, or by disregarding, or disobeying, some warning of danger at the place of injury or prohibition relating to the thing being done, either addressed to the workman or promulgated as a general rule of conduct while on the premises."

[4] Assuming, without holding, that compensation should be denied upon any of the foregoing grounds, we find none of them existing in the instant case. The record shows that it is the custom of miners and guards, situated in such circumstances as was Pallaro, to use dynamite for the purpose of blasting out stumps for fuel. It cannot therefore be claimed that Pallaro, by the use of the explosives, was manifestly reckless or exposed himself to an unreasonable hazard. It appears also to be admitted that the blasted stumps constitute the best and cheapest fuel that may be secured for heating or cooking purposes, at the premises of the company, taking into consideration the high altitude and the fact that the mountain, in the vicinity of the mine, has been denuded of all timber, and nothing but stumps remain upon the premises. Pallaro had no instructions not to use explosives. Under the circumstances, appearing from all the admitted facts, blasting stumps was a reasonable way in which to secure fuel.

We hold that the accident in question arose out of and in the course of the employment, and that at the time of receiving the fatal injury Pallaro was performing a service reasonably incident to his employment. The judgment is therefore affirmed.

Affirmed.

SUPREME COURT OF ERRORS OF CONNECTICUT.

PICCINIM ET AL.

v.

CONNECTICUT LIGHT & POWER CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —UNLAWFUL CONSORT AND ILLEGITIMATE CHILDREN—"FAMILY"—"DEPENDENT."

Under Workmen's Compensation Act, § 43, defining dependents as including members of the employee's "family" or next of kin, wholly or in part dependent, the children of decedent living with him and his unlawful consort were dependents; the word "family" being of elastic meaning.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent; Family.)

Appeal from Superior Court, Hartford County; William S. Case, Judge.

Proceeding by Clotilde Piccinim and others against the Connecticut Light & Power Company, under the Workmen's Compensation Act. Ap-

*Decision rendered, April 16, 1919. 106 Atl. Rep. 330.

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peal was taken to the superior court from the finding and award of the compensation commissioner in favor of plaintiff children, but not in favor of decedent's unlawful consort, and reserved on the facts found by the commissioner for advice of the Supreme Court. Advice to render judgment affirming commissioner's award.

Peter Salmon Salvatore Piedmonte, an employee of the defendant, was instantly killed while he was engaged in his work. His average weekly earnings were $25.84. In 1909 the deceased and Clotilde Piccinim, one of the claimants, under an agreement to marry, never fulfilled, began to live together as husband and wife. They continued to so reside together until his death. Three children were born to them during this period. They are joined with the mother as claimants, and are now 8, 6, and 4 years of age, respectively. Subsequent to their birth they lived with their parents and were regularly supported by the deceased. The commissioner denied compensation to the mother, and awarded $14 weekly for the period of 312 weeks to the children in equal amounts between them.

William E. Thoms, of Waterbury, for appellant.
Ralph O. Wells, of Hartford, for appellees.

PRENTICE, C. J. (after stating the facts as above). The Compensation Commissioners award to the three children born of the illicit relations long existing between the deceased and Clotilde Piccinim was made to them as dependents, and the only dependents, of the deceased at the time of his injury and resulting death, and as persons whose dependency was total. It is not contended by any of the parties that the commissioner erred in withholding compensation from the deceased's unlawful consort, and the respondent does not dispute that the finding of facts establishes that if the three children were the deceased's dependents within the meaning of our workmen's compensation statute they stood alone in that relation, and that their dependency was total. The questions by possibility presented by the record thus become reduced to one concerning which the parties stand in opposition, and that is whether or not these children were entitled to be regarded as the deceased's dependents.

Our act as enacted in 1913 defines dependents as meaning and including "members of the injured employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee at the time of the injury." P. A. 1913, c. 138, § 43. This definition has since remained unchanged, and appears in section 5388 of the Revision of 1918. The three children claimants in the present case satisfy all these statutory qualifications, if so be that they are to be regarded as members of the deceased's family in which they in fact resided.

The word "family" is one of elastic meaning, and is used in a great variety of significations. The wide range of its use is well illustrated by our own decision. In some of its uses the test for determining membership is found in the collective quality of the residence of the persons concerned and the unity of their domestic government and control. In those uses it is said to mean and embrace all the members of a collective body of persons living in one household and under one head and domestic government, and including servants and others as well as parents, children, and kin. Dalton v. Knights of Columbus, 80 Conn. 212, 215, 67 Atl. 510, 125 Am. St. Rep. 116, 11 Ann. Cas. 568; Cosgrove v. Cosgrove, 69 Conn. 416, 422, 38 Atl. 219; Wood v. Wood, 63 Conn. 324, 327, 28 Atl. 520; Hart v. Goldsmith, 51 Conn. 479, 480. In other instances regard is had for relationship by blood or otherwise between the different members of the group, as well as to the unity of residence and domestic control. Hart v. Goldsmith, 51 Conn. 479, 480; Dalton v. Knights of Columbus, 80

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Conn. 212, 216, 67 Atl. 510, 125 Am. St. Rep. 116, 11 Ann. Cas. 568. In still other cases the factors of collectivity of residence and unity of headship are ignored, and that of relationship made to furnish the test of membership. Hart v. Goldsmith, 51 Conn. 471, 480; Cosgrove v. Cosgrove, 69 Conn. 416, 422, 38 Atl. 219; Hoadly v. Wood, 71 Conn. 452, 456, 42 Atl. 263; Dalton v. Knights of Columbus, 80 Conn. 212, 216, 67 Atl. 510, 125 Am. St. Rep. 116, 11 Am. Cas. 568. Again it is held that the term may be employed to designate individuals whom it is the right of its head to control and his duties to support. Cheshire v. Burlington, 31 Conn. 326, 329.

But whatever be the accepted meaning of the word as used in the statutory definition under review, the three children claimants will not be excluded from the family group to which the deceased belonged and over which he presided, unless that meaning is one which either directly or indirectly raises a bar of exclusion for them out of their illegitimacy. Had they been born of a lawful union between their father and mother they would be able to satisfy every prerequisite of family membership which even the most restricted definition would embody, and to meet every requirement contained in any or all of them, whether it be of residence, relationship, duty to support, or right to control. They belonged to the collective group living in the household which the deceased maintained and of which he was the head; they would under the conditions named have been related to him by the closest possible ties of blood, and his right to control and duty to support them would have been unquestioned. The question before us, therefore, comes down to this: Does their illegitimacy ipso facto forbid that they be regarded as members of the deceased's family for the purpose of receiving compensation?

The act contains no express provision to that effect or language which, under accepted rules of construction, would lead to such interpretation. If, for practical application, it should be judicially said that such prohibition exists, it must be for the reason that their presence in the family group was in violation of law, or that their inclusion therein for the purposes of the act would not be consonant with a sound public policy, either upon moral grounds or in the matter of justice to employers, or that as illegitimates they should be penalized for their illegitimacy by being denied the rights and benefits accorded to all others under our Workmen's Compensation legislation.

It is, of course, true that one may not successfully assert a claim to membership in a family group and thereby secure benefits provided by the law whose presence in that group is in violation of law. Scott's Case, 117 Me. 436, 104 Atl. 794, 796; Armstrong v. Ind. Com., 161 Wis. 530, 531, 154 N. W. 844. That is the position in which the mother of these children found herself, and the commissioner has for that reason properly refused to recognize her as belonging to the deceased's family and denied her claim to share in an award of compensation. Gron v. Mass. Employees Ins. Co., 2 Mass. Ind. Acc. Board, 736, 741; Bustamente v. Gate City Ice, etc., Co., 2 Cal. Ind. Acc. Com. 120, 121; Bloom v. Tilin, 5 N. Y. State Dep. Rep. 441. The children's position in that household was a very different one. They were not only innocent of their parents' wrongdoing, but their father, in caring for them, was acting in obedience to the mandate of the law. It was alike his moral and legal duty to maintain them, and it was quite within his legal right to do so in the most natural and convenient way by taking them into his household. That he kept his unlawful consort there also is a matter for which they were not responsible. They certainly should not be punished for his unlawful act in so doing or hers in remaining.

There is nothing in their own conduct that calls for punishment and we are unable to discover how the cause of morality is to be advanced by the treatment of innocent children, although born of illicit relations, as so far outcasts from the social and legal pale that they are to be denied

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the benefit of those beneficial provisions which our law has adopted for the care, welfare, and maintenance of those who, helpless of themselves, are dependent for their sustenance and support upon the labor of others engaged in industrial pursuits. From whatever point of view this general subject is looked at it is, in its final analysis, but the meeting out of punishment to innocent, unfortunates for the wrongs of others to deprive these children of the rights and benefits which our workmen's compensation legislation accords to all others similarly situated in all respects save in the matter of the circumstances attending their coming into the world. See Dickenson's Appeal, 42 Conn 491, 511, 512, 19 Am. Rep. 553.

It has been suggested that it is not fair and just to employers that they should be called upon to contribute toward the maintenance of illegitimate offspring of an injured employee, and that, therefore, it is not consonant with public policy that they should be so called upon. Looked at from one angle that may seem to be true. So also when viewed from a similar angle, to wit, that of the old common law which attached liability to fault, it would appear to be in like manner unfair to employers that they should be compelled to assist in supporting the children or dependents of an employee who, without the employer's fault, has met with a mishap occasioning the loss or diminution of his earning power. But that is not the point of view of our compensation legislation. Compensation is not awarded either as the price of fault or as a measure of a duty owed to the injured employee. It is given in the execution of a general public policy that sees in its giving a blessed relief to those called upon to suffer as the result of industrial accidents, and a humane and wholesome social regulation. The underlying principle of this kind of legislation is that the ends of justice and equity will best be subserved and the general good promoted by lifting from the shoulders of unfortunate victims of industrial mishaps and their dependents some measure of the resulting burden, and casting it upon the industry which occasioned it and through that industry upon society at large. It is not the immediate employer who, by this procedure, ultimately bears the burden that he is in the first instance made to assume. In its final distribution society bears it. These children and all other children similarly circumstanced, whether they be legitimate or illegitimate, being in the world, must be supported. If their means of support is withdrawn, society is compelled to supply it. Why may it not as well and fairly supply it in the method provided by the workmen's compensation legislation as in any other? The act faces the certain prospect that individuals will have their earning power cut off or diminished either permanently or temporarily as the result of accidents attending their employment, and that other persons dependent upon them will be deprived for a longer or shorter time of their customary means of support, and seeks to provide a way in which the burden of that deprivation or diminution will be lightened. The result aimed at will be achieved only in part as long as any class of these sufferers are excepted from the beneficial operation of its provisions. Is there any reason why it should not be fully achieved, and all those who are called upon to suffer through industrial mischances be given an equal measure of relief in the manner the statute provides? We can conceive of none, and we are impelled to query whether, if it be true that this employer ought not, upon grounds of public policy, to be compelled to contribute to the maintenance of these children because their relationship to their father is not free from stain, the same test should not be applied to all claimants, so that all be required to establish their fitness to receive an award of compensation by showing a record of stainless ancestry.

Counsel for the claimant children seeks to fortify his claim in their behalf by an appeal to that portion of section 10 of the Workmen's Compensation Act, now appearing in section 5350 of the Revised Statutes, which provides that any child under the age of 18 years dependent upon his parents with whom he is living or from whom he is receiving support

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regularly at the time of the injury to such parents, there being no surviving dependent parent, shall be conclusively presumed to be wholly dependent for support upon the deceased employee. There is no need of such fortification. The position of the children as dependents and total dependents of the deceased is sufficiently established by their membership in the deceased's family, taken in connection with the other attending circumstances found by the commissioner. It would not be strengthened by holding that they were also children of the deceased within the meaning of the act.

The courts of Maine and Michigan, both of which states have statutes similar to ours, have decided the question here in issue in full accord with our conclusions. Scott's Case, 117 Me. 436, 104 Atl. 794, 796; Roberts v. Whaley, 192 Mich. 133, 138, 158 N. W. 209, L. R. A. 1918A, 189. The Industrial Accident Commission of California has upon repeated occasions similarly ruled. Bustamente v. Gate City Ice, etc., Co., 2 Cal. Ind. Acc. Com. 120; Pollock v. Wagner Leather Co., 3 Cal. Ind. Acc. Com. 37; Tarango v. McCombs, 3 Cal. Ind. Acc. Com. 63. Under the English act it has been held that an illegitimate child becomes a member of an injured employee's family in the same way and to the same extent as a legitimate. Schofield v. Orrell Colliery Co., 100 L. T. 104, 105. The Scotch act expressly provides that illegitimate children of an injured employee, in fact dependent upon him, shall be included among his dependents. Bowhill Coal Co. v. Neish et al., 46 Scottish L. R. 250. The only jurisdiction, as far as we are aware, in which illegitimates have been denied compensation by reason of their illegitimacy is New York, which has a statute radically different in its definition of dependents from ours. Bell v. Terry & Trency Co., 177 App. Div. 123, 163 N. Y. Supp. 733, 735.

The superior court is advised to render judgment affirming the award of the commissioner.

The other Judges concurred.

SUPREME COURT OF ILLINOIS.

COMPTON

v.

INDUSTRIAL COMMISSION ET AL. (No. 12553.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTRAHAZARDOUS EMPLOYMENT.

In proceeding against a board of education to recover for the death of a school janitor, caused by falling while trimming a tree in the schoolhouse grounds, where neither defendant nor deceased had accepted the act, an award could not be based on the occupation as extrahazardous, under Workmen's Compensation Act, § 3, par. 8, where it did not appear that the regulations referred to in such paragraph applied to the school building where decedent was employed.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

* Decision rendered, April 15, 1919. 122 N. E. Rep. 872.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ARISE OUT OF OR IN COURSE OF EMPLOYMENT."

Where a school janitor fell while trimming a tree in the schoolhouse grounds, and died from his injuries, the injury did not arise out of or in the course of his employment, even if defendant had been considered as engaged in an extrahazardous business.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of employment.)

Error to Circuit Court, Vermillion County; Walter Brewer, Judge.

Proceeding under the Workmen's Compensation Act by Timothy Compton, Jr., administrator of the estate of Timothy Compton, Sr., opposed by the Board of Education, employer. The Industrial Commission's denial of an award was sustained by the circuit court on certiorari, and claimant brings error. Affirmed.

Stephens & Wicks, of Danville (Wilbur R. Wicks, of Danville, of Counsel), for plaintiff in error.

Charles Troup, of Danville, for defendant in error.

FARMER, J. Timothy Compton, Sr., plaintiff in error's intestate, on June 24, 1915, while engaged in trimming a tree in the grounds of a public schoolhouse in Danville, fell and received injuries from which he died. His administrator made application for an award of compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). The arbitrator who heard the application made an award. On review the Industrial Commission reversed the decision of the arbitrator and denied an award. The decision of the Industrial Commission was reviewed by the circuit court on a writ of certiorari and the decision of the commission sustained. The court certified the cause was a proper one for review by the Supreme Court, and the record is brought before us by a writ of error.

The case was heard by the arbitrator and by the Industrial Commission on a stipulation of facts. It was agreed that defendant in error was engaged in maintaining public schools in Danville, Ill., for the free education of the children, and was not engaged in other business or enterprise; that deceased had for several years prior to his injury worked for the defendant in error as janitor; that neither of the parties had elected to accept and be subject to the Workmen's Compensation Act; that during the vacation period deceased worked for defendant in error for $2 per day, and during the school period for $55 per month; and that he died as the result of a fall on June 24, 1915, from a tree he was trimming in the Grant school grounds, in Danville.

Plaintiff in error concedes defendant in error, not having elected to provide compensation under the Workmen's Compensation Act, is not liable unless it is engaged in an enterprise, business, or occupation denominated as extrahazardous by section 3 of that act, but contends that by paragraph 8 of section 3 it is engaged in such extrahazardous business or occupation. Said paragraph 8 reads:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or business are hereby declared to be extrahazardous."

[1] The statutory regulations relied on by plaintiff in error are the provisions which make it the duty of boards of education to provide and maintain schools for not less than six nor more than ten months each

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year, give the board control and supervision of schoolhouses and authorize them to build, repair and improve them; also the statute requiring the doors leading out of public buildings, including schoolhouses, "now in process of construction or hereafter to be built, to be so constructed as to open outward; and the Fire Escape Act (Hurd's Rev. St. 1917, c. 55a, §§ 1-8), which provides that all buildings more than two stories in height used for schools shall be provided with a fire escape for each 50 persons accommodated above the second story. It is now shown by the record that the statutory regulations of school buildings relied on apply to the Grant school building. It nowhere appears that it was more than one story high, or that it was in process of construction or was built after the act came in force requiring the doors of public buildings "now in process of construction or hereafter to be built" to be so constructed as to open outward. In other words, it was not shown that the school building was subject to the statutory regulations referred to, and the record contains no regulatory municipal ordinance.

[2] Even if defendant in error, in the conduct and management of the school building, had been engaged in an extrahazardous business enterprise, or occupation, the injury did not arise out of or in the course of the deceased's employment in that business. He was not injured while engaged in the performance of any duty of his employment in or connected with the school building. Hahnemann Hospital v. Industrial Board, 282 Ill. 316, 118 N. E. 767, is clearly distinguishable from this case. This court said in substance in Marshall v. City of Pekin, 276 Ill. 187, 114 N. E. 497, that an employer engaged in an extrahazardous occupation, who has not elected to be bound by the Workmen's Compensation Act, cannot be compelled to provide compensation under the act for an employee injured in an occupation not extrahazardous under the statute, simply because such employer is also engaged in an extrahazardous employment. To the same effect are Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, Sanitary District v. Industrial Board, 282 Ill. 182, 118 N. E. 475, and Fruit v. Industrial Board, 284 Ill. 154, 119 N. E. 931.

The circuit court did not err in approving the decision of the Industrial Commission. The judgment is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

JOSEPH HALSTED CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12532.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW.

Decision of Industrial Board will not be reviewed by court if there is any evidence fairly tending to support the decision, the weight of the evidence being for the commission, and the court having no right to pass upon the preponderance thereof regardless of mistakes of the commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

* Decision rendered, April 15, 1919. 122 N. E. Rep. 822.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW.

The Supreme Court, in determining whether there is any evidence to sustain finding of Industrial Commission, will reject testimony contrary to a known natural law, but the mere improbability of the truth of evidence or its repugnance to other evidence does not authorize the court to say that it should have been disregarded by the commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PROCEEDINGS—EVIDENCE.

In proceedings under Workmen's Compensation Act, the fact that there is some legal evidence sustaining the issue on the part of the claimant is not sufficient to justify an award unless the greater weight of all the evidence is in his favor; the burden of proof being upon claimant.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS—BURDEN OF PROOF.

In proceedings under Workmen's Compensation Act before Industrial Board claimant has burden of proof.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF INJURY.

Where stockholder and director of employer company was within a few feet of injured employee at time of accident, lifted employee, and helped carry him into the shop and sent him to the hospital, the employer had notice of the injury; such notice being sufficient under Workmen's Compensation Act.

(For other cases, See Master and Servant, Dec. Dig. § 398.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by William C. Hartray, administrator for compensation for death of John Engelin, opposed by the Joseph Halsted Company, employer. Award of compensation by Industrial Board affirmed by circuit court, and the employer brings error. Affirmed.

Burt A. Crowe, of Chicago, for plaintiff in error.

C. Helmer Johnson, of Chicago (Thomas H. Murray, of Chicago, of counsel), for defendant in error.

DUNN, J. John Engelin, an employee of the Joseph Halsted Company, while engaged at his work on June 18, 1914, fell on a cement sidewalk and sustained a fracture of the skull, from which he died on the same day. A petition for an award of compensation was filed with the Industrial Board on December 8, 1914, and the committee of arbitration made a finding adverse to the petitioner. Upon review the Industrial Board made an award of compensation, which the circuit court upon a writ of certiorari reversed, remanding the cause to the Industrial Board. The board again made an award of compensation, which the circuit court affirmed, and the Joseph Halsted Company prosecutes this writ of error.

The plant of the Joseph Halsted Company is on the south side of Randolph street, in Chicago. Andrew Schnabel, a fellow employee, called Engelin out of the shop to help move a stair rail which was alongside the fence near the building, but not on the walk. Schnabel went out first,

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and Engelin followed him. Frederick Seymour, a stockholder and director of the Joseph Halsted Company, was going up the steps to the plant. L. J. Williams, an employee, was out on the sidewalk in front of the shop cutting channel iron. There was a grating between the sidewalk and the fence, leaning against the fence and tied to it, but not on the sidewalk. Schnabel stooped and took hold of the rail, expecting Engelin to take the other side. He turned and saw Engelin reel and fall to the sidewalk. Engelin fell in the middle of the walk, which was six feet wide, and he was not near the grating when he fell. Seymour heard the noise of the fall and turned and saw Engelin lying on the sidewalk. There was blood on the sidewalk. His feet were toward the outer edge of the sidewalk, his body slanting in a northeasterly direction. His hands were so tightly clenched that his fingers had to be pried open. Williams saw Engelin after Seymour had got to and had hold of him. His head was bleeding and he was frothing at the mouth. Engelin was an epileptic, subject to frequent and sudden attacks on the street or elsewhere, and had at one time been in an insane asylum. The coroner's jury found that his skull was fractured as a result of falling from epilepsy and striking his head on the sidewalk. None of these witnesses saw the beginning of the fall.

William Strauch, a machinist, testified that he was unemployed on June 18, 1914, and was looking for work. He passed the plant of the Joseph Halsted Company in the afternoon, and when about 30 or 40 feet away he saw two men come out of the shop, turn west, and walk a couple of steps. One of them stumbled against a grate 3 or 4 feet square, which was lying up against the building and extended out about a foot and a half. The man tripped over the grate, threw up his arms to balance himself, wheeled around, and fell on his back. Strauch did not have time to stop and went right on, but he saw two men come out of the shop, pick up the fallen man, and carry him in. On Thanksgiving Day Strauch called at the house of Engelin's son, who told Strauch about his father being killed and how it happened, and Strauch then told Engelin's son that Strauch was right there and saw the accident.

[1-4] It is contended for the plaintiff in error that the testimony of Strauch is improbable and incredible, and it is argued that the rule which requires the applicant to produce evidence fairly tending to show an accidental injury arising out of and in the course of the employment applies not only to the testimony of a single witness, but must take into consideration all the evidence in the case, and the court must determine whether or not the evidence, as a whole, fairly tends to support the finding of the Industrial Commission. We have held many times that where there is legal evidence tending to sustain the commission's finding its decision is conclusive. Whether the commission has fallen into error or not in determining the weight of the evidence, its decision is not subject to review by the courts. No mistake, however gross it may seem, in deciding upon the preponderance of the evidence, can be corrected by the courts, for the reason that no jurisdiction has been conferred upon the courts for that purpose, but, on the contrary, that power has been expressly denied. The testimony of a witness which is contrary to a known natural law will be rejected, but the mere improbability of its truth or its repugnance to other evidence does not authorize us to say that the commission should have disregarded it, when the Legislature has conferred the power to decide that question upon the commission and has denied it to us. The fact that there is some legal evidence sustaining the issue on the part of the claimant is not sufficient to justify an award by the commission unless the greater weight of all the evidence is in his favor, for the burden of proof is on the claimant, and it is the duty of the commission to consider and weigh all the evidence procured and decide according to its preponderance. The court, however, can consider only the evidence favorable to the claimant, and if the record contains

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evidence which fairly tends to support his claim, the finding in his favor is conclusive. The testimony that Engelin stumbled over the grate as he was going to pick up the stair rail tends to show the occurrence of an accident arising out of and in the course of his employment, and we are precluded from considering the evidence tending to a different conclusion.

[5] The plaintiff in error contends that it did not have notice of an accidental injury within 30 days, as required by the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). The accident happened at the plant of the plaintiff in error, and one of its directors who was within a few feet came instantly, lifted Engelin up partly, helped carry him in the shop, and sent him to the hospital. The contention of the plaintiff in error is that the circumstances all indicated that the injury to the deceased was caused by an epileptic attack, and did not arise out of his employment, and that it had no notice of facts or circumstances tending to show an accidental injury. The plaintiff in error had notice of the accident resulting in Engelin's death at the time and of the circumstances under which it occurred, and this is all the statute requires. Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Joilet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N. E. 423.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

HEED

v.

INDUSTRIAL COMMISSION ET AL. (No. 12565.)*

1. COMMERCE—INJURY IN INTERSTATE COMMERCE—WORKMEN'S COMPENSATION ACT.

If a railroad employee was engaged in interstate commerce at the time of an injury, he was not entitled to compensation under State Workmen's Compensation Act, and any remedy would be confined to federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), even if he would have no right of action under that act.

(For other cases, see Commerce, Dec. Dig. § 8[6].)

2. COMMERCE—INJURY IN "INTERSTATE COMMERCE"—JANITOR IN SHOPS.

A railroad employee who performed the ordinary duties of a janitor in shops which contained lathes and machinery and in which slight repairs were made upon engines hauling trains both in interstate and intrastate commerce, and who was injured by a splinter when breaking kindling, was not engaged in interstate commerce.

(For other cases, see Commerce, Dec. Dig. § 27[5].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

* Decision rendered, April 15, 1919. 122 N. E. Rep. 801.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM—BURDEN OF PROOF.

The burden is on an employee to prove that he made a claim for compensation within six months.

(For other cases, See Master and Servant, Dec. Dig. § 403.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—VERBAL NOTICE.

A verbal notice is sufficient.

(For other cases, see Master and Servant, Dec. Dig. 398.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF INDUSTRIAL BOARD—REVIEW.

A finding of Industrial Commission that an employee, whose written notice of a claim for compensation was filed one day after the allowed six months from the accident, had previously given a verbal notice to employer's claim agent could not be reviewed or set aside as to that question of fact.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AMOUNT OF AWARD—REVIEW.

Where an award was justified by a personal examination of the injury and by other evidence, it was not within jurisdiction of Supreme Court, on appeal, to set aside conclusions of Industrial Board as to extent of injury and amount of award.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD—EVIDENCE.

Testimony based on personal examination of an employee's injury, covering not merely subjective symptoms, but actual inspection, was not incompetent.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

Error to Circuit Court, Douglas County; George A. Sentel, Judge.

Proceedings by Thomas S. Pierce against W. J. Jackson, receiver of the Chicago & Eastern Illinois Railroad Company, of which Thomas D. Heed is now receiver, for compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). From a judgment of the circuit court confirming an award of the Industrial Board, the receiver brings error. Affirmed.

H. M. Steely and H. M. Steely, Jr., both of Danville, for plaintiff in error.

Charles W. Wortman and Clark & Hutton, all of Danville, for defendant in error.

CARTWRIGHT, J. The circuit court of Douglas county confirmed an award of the Industrial Board to the defendant in error, Thomas S. Pierce, for an accidental injury to his left hand received in the employment of W. J. Jackson, receiver of the Chicago & Eastern Illinois Railroad Company, of which the plaintiff in error, Thomas D. Heed, is now receiver, and certified that the case was one proper to be reviewed by this court.

The grounds urged for the reversal of the judgment are: (1) That Thomas S. Pierce was engaged in interstate commerce at the time of the accident; (2) that no notice of a claim for compensation was given within six months after the accident; (3) that the award is ex-

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cessive in amount; (4) that improper evidence was admitted, causing an excessive award.

[1, 2] Concerning the nature of the commerce in which Pierce was employed, the facts are as follows: He performed the ordinary duties of a janitor in the shops of the company at Villa Grove. His work was sweeping, cleaning up, building fires in stoves during cold weather, helping to load scrap iron, and doing other work of that kind. The shops contained lathes, planers, and machinery, and slight repairs were there made upon engines which ran in and out of Villa Grove. The engines hauled trains both in interstate and intrastate commerce. On the morning of February 6, 1916, Pierce came to the shops and was splitting and breaking up kindling wood for the purpose of building fires in the stoves when a splinter flew from a board and struck the middle finger of his left hand.

If Pierce was engaged in interstate commerce at the time of the accident, he was not entitled to compensation under the state law, and any remedy for his injury would be confined to the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), even if he would have no right of action under that act. New York Central Railroad Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; Erie Railroad Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. Slight repairs were made in these shops to engines which were engaged in both classes of commerce, and the facts bring the case within the rule declared in Minneapolis & St. Louis Railroad Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54. In that case, a machinist's helper engaged in making repairs in the roundhouse upon an engine which had been used in hauling freight trains in both interstate and intrastate freight, and which was used in the same way after the accident, was held not to be employed in interstate commerce within the meaning of the federal Employers' Liability Act. The court said that an engine, as such is not permanently devoted to any kind of traffic, and its character as an instrument of commerce depends upon its employment at the time, and not upon remote probabilities or accidental later events; that the case was not like repairs on a road permanently devoted to commerce between the states, nor like the case of an engine interrupted in an interstate haul and then to go on again with the haul. Pierce was not engaged in interstate commerce.

[3-5] The burden was on Pierce to prove that he made a claim for compensation within six months, but a verbal notice is sufficient. Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496; Conway Co. v. Industrial Board, 282 Ill. 313, 118 N. E. 705. He gave a written notice of his claim for compensation on August 7, 1916—one day after the expiration of six months from the accident—but he testified that he also gave a verbal notice to the claim agent of the railroad company on April 1, 1916, while he was being treated for his injury in Chicago, where the railroad company had sent him for that purpose. His testimony that verbal notice was given was disputed by the claim agent and another witness, but the Industrial Board found the fact to be as testified by Pierce, and we have no power to review or set aside the finding as to that question of fact.

[6] The claim that the compensation awarded was excessive is that the testimony of a doctor practicing generally, and one practicing as an osteopath, who made personal examinations of the hand for the purpose of testifying, was not as reliable as that of the doctor who treated Pierce at the time of the injury and afterward. The award was justified by the opinion, derived from a personal examination, that there was limited action of the fingers, and especially of the middle finger, which was permanent and which disqualified Pierce from ordinary uses of the hand. The evidence for the railroad company was that Pierce made considerable use of his hand while working on a farm and mixing cement, and that if

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he would use his hand it would improve, and he would have reasonable use of it for ordinary purposes. Pierce also testified to inability to close his fingers and make practical use of the hand, and the Industrial Board found according to the evidence produced by the claimant. It is not within the jurisdiction of this court to set aside the conclusion of the board as to the facts.

[7] The final proposition that improper evidence was admitted relates to the same claim—that an excessive award was caused by the opinions based on the personal examination. The testimony was not merely of subjective symptoms, but was based on actual inspection and was not incompetent.

The jugment is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

PEABODY COAL CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12514.)*

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —MATTERS REVIEWABLE—"FINAL ORDER."

In proceeding under Workmen's Compensation Act, an order to the circuit court quashing the record and remitting the case to the Industrial Board for further proceedings, not in any manner attempting to fix the rights of the parties, is not a "final order," reviewable by the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 418[2].)

(For other definitions, see Words and Phrases, First and Second Series, Final Order.)

Error to Circuit Court, Christian County; J. C. McBride, Judge.

Proceeding under the Workmen's Compensation Act by John J. Bullington, administrator of the estate of Valentino Borio, deceased opposed by the Peabody Coal Company, the employer. An award of the Industrial Board was set aside, the case remanded by the circuit court, and claimant brings error. Writ dismissed.

A. W. Kerr and W. J. MacDonald, both of Sprinfield, for plaintiff in error.

Bates, Hicks & Folonie, of Chicago, and Provine & Provine, of Taylorsville, for defendant in error.

STONE, J. The circuit court of Christian county set aside the award of the Industrial Board awarding compensation to plaintiff in error, administrator of the estate of Valentino Borio. It was urged before the Industrial Board on review and before the circuit court that the Industrial Board had no power to issue a dedimus potestatem to take depositions in a foreign country under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i), as the same was in force at the time of the

*Decision rendered, April 15, 1919. 122 N. E. Rep. 843.

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hearing before the arbitrator, on June 22, 1916, and that therefore there was no competent evidence before the board on the question of the dependents of deceased. An agreement as follows was entered into:

"It is stipulated by and between the parties that decedent and respondent were operating under the terms of the Compensation Act on October 23, 1915; that deceased died on that date as a result of injuries received in the course of his employment for the respondent; that if an award is made it shall be for $2,500. Agreed that his earnings would amount to $625 per year. It is further agreed that a certain paper designated a declaration, produced and offered by the applicant, being statements of witnesses in Italy under oath, is offered and received in evidence the same in all respects as if a dedimus had been properly issued and said statements taken thereunder in the form of depositions; that for the purpose of saving time and delay it is stipulated that there is preserved to the respondent any and all rights which it might have to object to the introduction of said testimony, particuarly on the ground that the Industrial Board of the state of Illinois is without authority, under the Workmen's Compensation Law of Illinois, to issue a dedimus potestatem to the officers of the kingdom of Italy, and this paper is received subject to said objection, the same as if said declaration was in the form of depositions. It is further stipulated that in event of an award to applicant, if respondent desires to appeal, no lump-sum payment shall be asked for until respondent has full opportunity to prosecute his appeal, and in the event of an appeal, and the reviewing court refuses to pass upon the matter of the deposition because of the form in which it is presented, or should hold a deposition cannot be taken under the authority of the Industrial Board, then the case shall stand in every respect the same as if these proceedings had never been had and stipulations now made as to earnings will not control and the case shall be open to proof on all questions."

The sworn declaration of the three witnesses referred to, when translated, is as follows:

"We, the undersigned, of this township, personally knowing the Borio family, we assert and declare that Valentino Borio, of Guiseppe, deceased, born in Gourne the 7th day of March, 1862, died in Kincaid, Ill., 23d day of October, 1915, was the only support of his mother, Mary Borio, widow, age (77) seventy-seven years, and deserving support because of her old age and infirmity. The said Valentino Borio used to support her by sending her a monthly sum of $10, sometimes more depending on his work and earnings, thus she was by him supported."

On a hearing the circuit court entered an order reviewing the proceedings, holding that there was no proper competent legal evidence of the heirs dependent upon the deceased; that the Industrial Board had no authority to issue a dedimus potestatem at the time of the hearing before the arbitrator or at the time of the hearing before the Industrial Board. The order also recites the stipulation of the parties, and orders that the record of the Industrial Board be quashed, and that the cause be remanded to the Industrial Board for such other and further proceedings as it sees fit to take, consistent with the order of the court and the stipulation of the parties.

[1] It is contended by the defendant in error that the order of the circuit court quashing the record and remanding the cause to the Industrial Board for further proceedings consistent with the rulings of the circuit court and the stipulation of the parties is not a final judgment, and that for the reason it is not subject to review in this court upon writ of error. An order of the circuit court quashing the entire record of an inferior tribunal is a final judgment. The whole proceedings of the inferior tribunal fall, and with them all incidental proceedings thereon. 6 Cyc. 835; Lord v. New York, 3 Hill (N. Y.) 426; Morrison v. Emsley, 53 Mich. 564, 19 N. W. 187. It is evident upon reading said written order,

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however, that the circuit court did not quash the entire record, but did so only in so far as that record related to the matter of the evidence before the Industrial Board which was treated in the stipulation as a deposition. The prder of that court directing the taking of further proceedings by said board makes it evident that the court did not quash the entire record, and the use of those terms in the written order is not controlling, where it is evident from the entire order that something else was intended. The order of the circuit court, in effect, sustained the objection of the plaintiff in error to the competency of the evidence offered and found there was no legal evidence of dependency. The cause was thereupon in and by said order remanded for further proceedings by said board. This was the only remanding order authorized by the statute.

Paragraph (f) of section 19 of the Compensation Act, as amended in 1915 (Laws 1915, p. 410), provides, in part as follows:

"The court [circuit court] may confirm or set aside the decision of the arbitrator or committee or arbitration or Industrial Board. If the decision is set aside and the facts found in the poceedings before the board are sufficient, the court may enter such decision as is justified by law, or may remand the cause to the Industrial Board for further proceedings, and may state the questions requiring further hearing, and give such other instructions as may be proper. Judgments, orders and decrees of the circuit court under this act shall be reviewed only by the Supreme Court upon writ of error."

[2] Under the statute the circuit court had two courses open to it on review of the proceedings by certiorari: Either to set aside the decision and enter such decision upon the facts as is justified and required by law, or to remand the cause to the commission for further proceedings. If the finding of the board is "founded on hearsay or other improper or insufficient evidence, it is the duty of the circuit court, on certiorari, to remand the proceeding to the Industrial Board for proper proceedings." Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas 1918B, 627. Section 91 of the Practice Act Provides that appeals to and writs of error from this court are allowed to review the final judgments, orders or decrees of any of the circuit courts in any suit or proceeding in law or chancery. Hurd's Stat. 1917, p. 2248. A judgment or decree is final and appealable only when it terminates the litigation between the parties on the merits of the case, so that, when affirmed, the court below has only to proceed with the execution of the judgment or decree. Rosenthal v. Board of Education, 239 Ill. 29, 87 N. E. 878; Chicago & Northwestern Railway Co. v. City of Chicago, 148 Ill. 141, 35 N. E. 881; Gray v. Ames, 220 Ill. 251, 77 N. E. 219, 5 Ann. Cas. 174; Brodhead v. Minges, 198 Ill. 513, 64 N. E. 998; Gunn v. Donoghue, 135 Ill. 479, 25 N. E. 750.

[3, 4] As the order of the circuit court did not in any manner attempt to fix the rights of the parties to said proceeding, it was not a final order, and this court is without jurisdiction to review any other question. The certificate of the judge of the circuit court that the cause is one proper to be reviewed by this court cannot give this court jurisdiction to review an interlocutory order. The writ of error will therefore be dismissed.

Writ dismissed.

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SUPREME COURT OF ILLINOIS.

ROCK ISLAND BRIDGE & IRON WORKS

v.

INDUSTRIAL COMMISSION ET AL. (No. 12282.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"DEPENDENT."

In law, a "dependent" is one who is sustained by another, or relies for support upon the aid of another, who looks to another for support, and relies on another for reasonable necessaries consistent with the dependent's position in life.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—QUESTIONS OF DEPENDENCY—FINDINGS OF INDUSTRIAL COMMISSION.

Questions of dependency, within the Workmen's Compensation Act, and its extent, are questions of fact, with decision of which by the Industrial Commission the courts cannot interfere, if there is evidence tending to sustain its findings.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY—FINDING OF INDUSTRIAL COMMISSION—EVIDENCE.

In proceeding for compensation under Workmen's Compensation Act for death of employee, finding of Industrial Commission that employee's mother was partially dependent upon him, a question of fact, *held* supported by evidence, and not reviewable.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"DEPENDENCY" OF MOTHER.

Dependency of mother on her son killed in service, which justifies award of compensation to her under Workmen's Compensation Act, is a personal dependency for support and maintenance, an actual dependency and support consistent with her position in life, not including maintenance of others, as her children, whom son was under no legal obligation to maintain, or contributions which merely enabled mother to accumulate money.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependency.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTENT OF PARTIAL DEPENDENCY—FINDING OF INDUSTRIAL COMMISSION—EVIDENCE.

Finding of the Industrial Commission that deceased employee's mother, to whom he had contributed $50 a month for use by her in the main-

*Decision rendered, April 15, 1919. 122 N. E. Rep. 830.

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tenance of the household, was partially dependent upon him to the extent of 56 per cent. of total dependency, *held* unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MINIMUM AWARD TO PARTIAL DEPENDENT.

By the Workmen's Compensation Act of 1917, one partially dependent on the deceased employee, whatever the degree of dependency, was entitled to the minimum award provided of $1,650.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to Circuit Court Rock Island County; F. D. Ramsay, Judge.

Proceeding under Workmen's Compensation Act by James McQuaid, administrator, for compensation for the death of John McQuaid, employee, opposed by the Rock Island Bridge & Iron Works, the employer. Compensation was awarded to Mary McQuaid, decedent's mother, by the Industrial Accident Board, the circuit court quashed a writ of certiorari to review the award, and the employer brings error. Reversed and remanded.

J. C. M. Clow, of Chicago, and C. J. Searle, of Rock Island, for plaintiff in error.

Kenworthy, Dietz, Shallberg, Harper & Sinnett, of Moline, for defendant in error.

DUNN, J. This writ of error was sued out by the Rock Island Bridge & Iron Works to reverse a judgment of the circuit court of Rock Island county quashing a writ of certiorari to review an award made by the Industrial Commission against the plaintiff in error in favor of James McQuaid, administrator of the estate of his son, John McQuaid, an employee of the plaintiff in error, who died on August 12, 1917, from an accidental injury arising out of and in the course of his employment. The commission found that the deceased's wages were $1,400 a year; that his mother, Mary McQuaid, was his sole beneficiary and was partially dependent upon him to the extent of 56 per cent. of total dependency, and was entitled to receive 56 per cent. of four times his annual wages, being $3,136, and made an award of that amount.

The only substantial objection made to the award is that there is no evidence in the record to sustain it. The evidence shows that John McQuaid was 26 years old, unmarried, and living in his father's house with his father, mother, two adult sisters and a 10 year old brother. His father was 63 years old, in bad health, and did not work. He owned some property and had an income of about $500 a year. He gave his wife $40 a month, the deceased gave her $50 a month, and she paid the household expenses of the family. The daughters worked, but contributed nothing to the household expenses and paid no board.

[1] The Workmen's Compensation Act of 1917 (Laws 1917, p. 493) provides that the amount of compensation for an injury resulting in death, if the deceased leaves no widow, child, or totally dependent parent, but does leave a partially dependent parent, shall be such proportion of a sum equal to four times the annual earnings of the employee as such partial dependency bears to total dependency, but not less, in any event, than $1,650 or more than $3,500. In law a dependent is one who is sustained by another, or relies for support upon the aid of another; who looks to another for support, and relies on another for reasonable necessaries consistent with the dependent's position in life. Jackson v. Erie Railroad Co., 86 N. J. Law, 550, 91 Atl. 1035; Women's Catholic Order of Foresters v. Hefferman, 283 Ill. 429, 119 N. E. 426.

[2-6] Questions of dependency, and the extent of it, are questions

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of fact, with the decision of which by the commission the courts cannot interfere if there is evidence tending to sustain its findings. The evidence tended to show that the mother's only means of support was $90 a month, which she received from her husband and her son. While her husband was under a legal duty to support her, the question whether she actually received all or a part of her support from her son and looked to him for such support is a question of fact, which upon this record is concluded by the finding of the commission that she was partially dependent upon him. There is, however, no evidence which tends to sustain the finding that her dependency was 56 per cent of total dependency. The evidence is that she received $90 a month, all of which was expended in paying the expenses of the family of six persons. The dependency which justifies an award is a personal dependency for support and maintenance—an actual dependency for support consistent with the dependent's position in life. It does not include the maintenance of others whom the dependent is under no legal obligation to maintain or contributions which merely enable the donee to accumulate money. The $50 a month contributed to his mother by the deceased was not given and was not used for her support and maintenance alone. There is no evidence from which it can be ascertained how much or what porportion either of the $50 or of the $90 was used for the support and maintenance of the mother. The $40 from the husband's income was at least a partial support. The additional $50 was a general benefit to the family, but there is no basis in the evidence for determining what proportion of it was used for the support of the mother and what proportion for general family expenses. There is therefore no basis for the finding that her dependency was 56 per cent. of total dependency. The finding of partial dependency, whatever its degree, entitled the claimant to the minimum award of $1,650.

The facts found were sufficient to constitute the basis for a proper decision, and the judgment of the circuit court is therefore reversed, and the cause is remanded, with directions to enter an award for $1,650, payable in installments, if the claimant shall elect to accept such award; otherwise, to remand the cause to the Industrial Commission for another hearing.

Reversed and remanded, with directions.

SUPREME COURT OF ILLINOIS.

SWIFT & CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12280.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PRORCEEDINGS—BURDEN OF PROOF.

In workmen's compensation proceeding applicant has burden of proving his case, but evidence sufficient to make a reasonable person conclude that applicant was injured while performing his duites in the course of his employment or duties incidental to that employment is sufficient.

(For other cases, see Master and Servant, Dec. Dig. §§ 403, 405[4].)

*Decision rendered, April 15, 1919. 122 N. E. 796.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW.

The finding of the Industrial Board will not be set aside by the Supreme Court if warranted by the evidence, although court might have reached a different conclusion on the evidence; the only question being whether the board was justified, on the facts proved, in drawing its conclusion.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COURSE OF EMPLOYMENT—FIGHT BETWEEN EMPLOYEES.

In proceedings for compensation for injuries to employee sustained in fight with another employee, facts as to who was the aggressor and as to the comparative size and strength of the two employees are not controlling on question whether injury rose out of and in the course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

4. MASTER AND SERVANT—FIGHT BETWEEN EMPLOYEES —COURSE OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.

In proceedings for compensation for injuries sustained in a fight, evidence *held* to sustain finding that the altercation grew out of matters connected with injured employee's work, and that it was not purely a personal one entirely outside of the scope of such employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under Workmen's Compensation Act by Frank Blum for compensation for injuries, opposed by Swift & Co., employer. Award of Industrial Board affirmed by circuit court, and employer brings error. Affirmed.

Thomas M. Coen and John E. Kehoe, both of Chicago, for plaintiff in error.

John A. Bloomingston, of Chicago, for defendant in error.

CARTER, J. An application was filed with the Industrial Board on October 13, 1914, by Frank Blum, defendant in error, for adjustment of claim for injuries alleged to have been incurred by him while in the employ of Swift & Co. The arbitration committee decided that he was not entitled to compensation. On review the Industrial Board awarded compensation of $7.50 per week for a period of 416 weeks from April 10, 1914, and ordered that, if at the expiration of that time Blum were living, he should recover from the plaintiff in error a pension of $257.60 a year, payable semi-monthly, as long as he might live. The case was taken to the circuit court of Cook county by writ of certiorari, and the judgment of the Industrial Board was affirmed. The trial judge certified that the cause was one proper to be reviewed by this court, and it is here on writ of error.

At the time of the injury, April 3, 1914, Frank Blum was employed by Swift & Co. at its packing plant at the Union Stockyards in Chicago. At and before the time of the injury it was his duty, together with other employees in the steam-fitting department, to look after water pipe leaks in the different buildings, including that occupied by the pork department. The custom was, throughout these buildings, in case of pipe leaks and other matters where repairs were needed, to blow a whistle, in response

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to which an employee of the steam-fitting department would come. Frank Nieukirk was foreman of sewing and tying in the smoked meat room on the fourth floor of house No. 19 of the pork department. On the Sunday prior to the injury Nieukirk told Blum there was a leak in one of the pipes on the fourth floor, and, according to Nieukirk's testimony, Blum replied that he would take care of it. On Thursday before the injury Frank Selen, who worked with Blum in the steam-fitting department, attempted to repair the leak, but without success, and the pipe kept leaking. Nieukirk directed the whistle be blown for one of the pipe repairmen. There was no response, and he ordered the whistle blown again, and then the third time. Selen upon hearing the whistle, found Blum and told him of the call. Blum started at once for Nieukirk's department, and Selen followed a short distance behind. When Blum entered the smoked meat room, he walked at once toward Nieukirk, and, according to the latter's testimony on the hearing, the first he knew Blum came up to him, took him by the shoulder, pulled him around and asked, "What do you want?" Nieukirk testified:

"I had not spoken to Blum before. Blum said, 'What in hell do you fellows mean by blowing a whistle?' I says, 'You know what we want; we want that leak repaired.' I says, 'I want to work in harmony with you as much as I can; I tried to get you to fix this leak since last Sunday; nothing has been done to remedy it since.' He says, 'Well, I haven't got time to fix the leak.' I says, 'All right; that is all I want to know; I will take it up with the superintendent's office and see that this leak is done; I don't like to go over you boys' heads, but that is what I am going to do this time.' He says, 'All right; go ahead; I will fix you.' He stepped around with an attitude as if he was going to strike me, and said, 'All right, you bastard, go ahead; I will fix you.' He stepped around in an attitude to strike, and I hit him with my fist. He had a valve or pipe. He raised his hand up to strike, clear up, in a manner of striking me. I am sure about that."

Nieukirk further testified that he had never had any trouble before with Blum, and that Blum was apparently a harmless individual, though of a quarrelsome disposition.

When struck by Nieukirk, Blum fell to the cement floor and sustained a basal fracture of the occipital bone, either by the blow or the fall. The testimony shows without contradiction that after the injury he was confined to his bed until August, and after that was unable to walk, except with difficulty; that his memory was gone, and he could not articulate properly. On the hearing of this proceeding he testified, but it was apparent that he remembered very little, if anything in regard to the accident or how it occurred. He did, however, testify that he had no feeling or grudge against Nieukirk, and, so far as he remembered, did not raise his hand to strike him; that he never wanted to have a scrap there. According to Nieukirk's testimony, also, there had never been any trouble between himself and Blum before that time. Selen, Blum's assistant, who followed into the room and according to his testimony was about 30 feet away at the time of the accident, does not understand English very well. He testified that he did not see Blum start to hit Nieukirk; that Nieukirk and Blum were both talking loud; and that Blum was moving his hands. Miss Owens, another witness, who was working in the room, did not see Blum raise the pipe or valve which he had in his hand over his head, but testified that he had the pipe in his hand, and that his hand was drawn back, as we understand the record, about 6 inches. Mrs. Brzana, another employee, was sewing bags, with her back to Nieukirk and Blum, at the beginning of their interview, but turned around to watch them, and she testified in answer to a question that Blum did not raise his hand to strike Nieukirk, but afterwards, on cross-examination, stated that she may not have seen all that took place. Timothy Kelleher was called by plaintiff in error, and was the best situated to hear and see all that took

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place. He stated that Nieukirk, at the time Blum came into the room, was piling hams on a truck; that witness was close at hand; that Blum stood on the end of the truck nearest witness; that he heard them talking loud; but that the first he took heed of was Nieukirk telling Blum to get away, which he did three times, and then Blum threw his right hand back about six inches, and Nieukirk immediately struck him on the jaw and knocked him down.

These are all the witnesses who testified with reference to this occurrence. All of them, as we understand the record, testified before the arbitrator, but their testimony was not heard before the Industrial Board except that of Mrs. Brzana, which seems to have been taken before the board. All of these witnesses except Kelleher were called by defendant in error, and it is argued by counsel for plaintiff in error that defendant in error is bound by the testimony of Nieukirk as to what took place, as Nieukirk was called by him, and was the only witness who testified in detail as to what happened, and that, so far as any of the other witnesses testified, their testimony tends to corroborate that of Nieukirk; while counsel for defendant in error insists that Nieukirk's testimony is contradicted in material matters, especially as to Blum threatening to strike him or raising his hand in a threatening attitude. Counsel for both parties are very vehement in their arguments in the briefs as to what actually occurred and contradict each other very positively, each claiming that the statements of opposing counsel as to certain facts are not borne out by the record. We think it is clear that Nieukirk's testimony as to Blum raising his hand in a threatening attitude to strike him with a valve or iron in his hand, before Nieukirk struck Blum, is not corroborated in the record by the testimony of any other witness. The most that can be said is that Kelleher testified that Blum drew his hand back, and that the motion was such that witness would think that something was going to happen, but there is no testimony, outside of Nieukirk's, that the hand was raised high in a threatening manner. Four witnesses testified to seeing the blow struck. Nieukirk's testimony is to the effect that he struck the blow immediately upon Blum raising his hand in a threatening manner. and while it is true that none of these witnesses except Kelleher were so situated that they could see all that took place or that they claimed they saw all that took place, it would seem somewhat surprising, if Blum had raised his hand in a threatening manner, as testified by Nieukirk, that some of them would not have seen that act; for two of them did testify that Blum drew his hand back.

The chief question discussed in the briefs is whether or not this accident arose out of and in the course of Blum's employment. This court has said that an employee is injured in the course of his employment when the injury occurs within the period of his employment at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. We have said also that there must be some causal relation between the employment and the injury; that it is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment. Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530. See, also, In re McNicol, 215 Mass 497, 102 N. E. 697, L. R. A. 1916A, 306. The courts do not usually disagree as to the general fundamental principles necessary for recovery under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i), but in the great variety of circumstances under which they are called upon to apply these principles they sometimes disagree as to the application of the law to the facts. As this court said in Pekin Cooperage Co. v. Industrial Com., supra, two cases are seldom precisely alike in their facts, and the opinion further states (285 Ill. p. 35, 120 N. E. 532:

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"All concur in the rule that the accident, to be within the Compensation Act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injuries the other, it may be inferred that the injury arose out of the employment."

The opinion in that case reviews a large number of cases in other jurisdictions where the injury was caused by disagreements of fellow employees, and it is apparent from an examination of those various cases that they are not all consistent, and, as stated in that opinion, not all in harmony with the ruling of this court in that case.

Counsel for defendant in error in this connection argues at length that under the reasoning of this court in Ohio Building Vault Co. v. Industrial Board, 277 Ill 96, 115 N. E. 149, and other cases of like nature where men employed as night watchmen were attacked, the test whether they were injured in the course of their employment was stated to be whether they were engaged in duties such as were likely to cause the watchmen to deal with people who were likely to attack them, but we do not think the Ohio Building Vault Co. Case and other cases of like nature as to watchmen or night policemen are controlling on the question here before us. Those cases were dealing with questions very different from the questions here involved. The case of Pekin Cooperage Co. v. Industrial Com., supra, and cases therein cited and reviewed, are much more in point on the question here under consideration.

The argument of counsel for plaintiff in error is that the accident did not occur in the course of and arise out of the employment of Blum, because, after Blum reached the room where Nieukirk was and found out what was wanted, it was his duty to go at once and repair the leaking pipe, but that he chose to remain at the place where Nieukirk was working and engaged him in a verbal dispute; that from the time he was told what was wanted until the accident he had been acting out of the course of his employment and was gratifying merely his own personal feelings in carrying on a dispute. Counsel also argues that, even though Nieukirk was the aggressor in a physical conflict, he testified that he was prompted to strike Blum in what he considered self-defense, and that therefore he (Nieukirk) was not acting within the line of his employment. Counsel for defendant in error argues that, even though Nieukirk's story is literally true as to how the altercation started and as to everything that happened there, yet it is clear from uncontradicted testimony that Blum went there in response to the whistle calling him; that Nieukirk was insisting that he had complained several times about the leak and that it had not been fixed, and that while talking about the matter Nieukirk struck Blum without any provocation; that in any event the talk was about the work of the master; that neither had a personal grudge against the other; that the blow was struck after the argument regarding the master's work, and, whether the foreman's explanation is correct or not, that the accident arose out of and in the course of the employment; that, even though it is true the blow was struck either as the result of anger on the part of Nieukirk or a mistaken idea as to being necessary for his self-defense, it grew out of a discussion over business, and not out of the personal matters of either Blum or Nieukirk. Counsel on both sides have cited numerous authorities as tending to support their respective positions in this case, but none of them are so similar on the facts that we deem it necessary to review or distinguish them.

[1, 2] This court has said that the burden of proof rests upon the

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applicant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, but that such proof may be circumstantial as well as direct. Ohio Building Vault Co. v. Industrial Board, supra, and cases there cited. We have also said that it is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn by the Industrial Board, but that the evidence must be such as would induce a reasonable man to draw it; that where there is ground for comparing and balancing probabilities at their respective values, and where the more probable conclusion is that for which the applicant contends the arbitrator is justified in drawing an inference in favor of the applicant. Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651. It has also been said that what is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent; that what is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. Owners of Ship Swansea Vale v. Rice, 4 B. W .C. C. 298. While the burden of proof is on the applicant to prove his case, this does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the applicant was injured while performing his duties in the course of his employment or duties incidental to that employment, then the case is proved. Marshall v. Owners of Ship Wild Rose, 3 B. W. C. C. 514. In proceedings under the Workmen's Compensation Law this court's consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award, and, if so, the weight of evidence to the contrary will not be considered. Pekin Cooperage Co. v. Industrial Com., supra. The only question before the court is whether the Industrial Board was justified, on the facts proved, in drawing the conclusion that it has drawn. The finding of the Industrial Board is not to be set aside if warranted by the evidence, although the court might feel that a different conclusion would have been reached if the members of the court had been called upon to decide the question in the first instance. Von Ette v. Globe Newspaper Co., 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641.

[3, 4] We find much discussion in the briefs as to who was the aggressor in the fight in which Blum was injured. While such question might have some bearing on whether the dispute arose out of and in the course of the employment or was purely a personal matter between the parties, we do not think it is necessarily decisive. Considerable space is taken up in the briefs as to the comparative size and physical strength of Nieukirk and Blum. We find nothing in the record that clearly and definitely shows the size, weight or physical ability of Blum, and, moreover, we do not regard the comparative size and physical strength of these men as a controlling fact in deciding the question here under consideration. We think there is evidence in the record that justified the Industrial Board in finding that the altercation grew out of matters connected with Blum's work, and that therefore the accident arose out of and in the course of his employment, and that the altercation was not purely a personal one, entirely outside of the scope of such employment. The fact that Blum was not actually doing the special work of repairing when he was injured does not alter the case. He was where he was expected to be, preparatory to fixing the leak.

While the case, upon the facts and application of the law, is close, we hold that there is sufficient competent evidence in the record to justify the conclusion of the Industrial Board, and that therefore the courts are bound by that finding.

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The judgment of the circuit court will therefore be affirmed.
Judgment affirmed.
Cartwright, J., took no part in this decision.

SUPREME COURT OF ILLINOIS.

TAZEWELL COAL CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12623.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—JURISDICTION—PRESUMPTION.

There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction, such as the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CERTIORARI—SUFFICIENCY OF RETURN.

Return to writ of certiorari commanding Industrial Board to certify to the court a complete record of proceedings whereby the board, under Workmen's Compensation Act, § 9, had commuted compensation to lump sum, on claimant's petition therefor, must show that notice of the proceedings was given employer, and must contain the testimony upon which board's decision was based, in order that employer may not be deprived of its right to a judicial review of the proceedings.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

Error to Circuit Court, Tazewell County; J. M. Niehaus, Judge.

Proceedings under Workmen's Compensation Act by Martina Lipnick, administratrix of the estate of Andrew Lipnick, deceased, for compensation for the death of Andrew Lipnick, opposed by the Tazewell Coal Company, employer. Award to claimant by Industrial Board was commuted upon claimant's petition therefor, and employer petitioned for writ of certiorari. Writ quashed by circuit court, and employer brings error. Reversed and remanded.

William A. Potts, of Peoria, for plaintiff in error.

J. P. St. Cerny, of Pekin (W. B. Cooney, of Pekin, of counsel), for defendant in error.

CARTWRIGHT, J. The Industrial Board awarded compensation to defendant in error, Martina Lipnick, administratrix of the estate of Andrew Lipnick, deceased, on account of his death while in the employment of plaintiff in error, the Tazewell Coal Company. On September 12, 1917, plaintiff in error filed its verified petition in the circuit court of Tazewell county, alleging that on July 2, 1917, defendant in error, Martina Lipnick, filed her petition for payment of the compensation in a lump sum, and upon a hearing an order was made on August 21, 1917, by which the compensation was commuted to a lump sum of $3,093.74, and notice of the

*Decision rendered, April 15, 1919. 123 N. E. Rep. 28.

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order was received by plaintiff in error on August 25, 1917, that no notice of the filing of the petition was given to plaintiff in error, and it had no notice of the pendency of the petition and no opportunity to appear and oppose, by evidence or otherwise, the commutation of the award to a lump sum, and that the Industrial Board had no jurisdiction of the cause or the person of the plaintiff in error. The petition prayed for a writ of certiorari commanding the Industrial Board to certify to the court a full and complete record of the proceedings. The writ was issued and a return was made certified as a full and complete record, which showed a petition for the commutation of the compensation to a lump sum and alleging facts upon which the petition was based. Concerning jurisdiction and the basis for the finding and order of the board the record is as follows:

"The said board having given proper notice to the parties hereto, and said matter now coming to be heard, the board, upon proper showing of the parties hereto, and having made careful inquiry and investigation of said matter, and being fully advised hereto that compensation be paid for the best interest of the parties hereto that compensation be paid in a lump sum."

The court quashed the writ of certiorari, dismissed the petition, rendered judgment for costs against plaintiff in error, and certified that the cause was one proper to be reviewed by this court.

[1, 2] Section 9 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 134) provides that upon a petition to the Industrial Board, if, upon proper notice to the interested parties and a proper showing made before the board, it appears for the best interest of the parties that the compensation be paid in a lump sum, the board may order commutation to an equivalent lump sum. The statute does not prescribe the character of notice which shall be given, or the length of time or manner of service, but only that there shall be proper notice. The record does not show any rule or regulation of the board as to what is regarded as proper notice, or what notice is to be given, which would be subject to judicial review to determine its reasonableness. Kettles v. People, 221 Ill. 221, 77 N. E. 472. The Constitution affords protection against the imposition of any liability without notice and an opportunity to be heard. There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction, such as an Industrial Board. Nothing is taken by intendment in favor of such jurisdiction, but the facts upon which the jurisdiction is founded must appear in the record. The record filed in return to the writ does not show what notice was given to plaintiff in error, or what method of informing plaintiff in error of the proceeding was adopted or regarded proper by the Industrial Board, and the record fails to show jurisdiction over plaintiff in error or any authority of the board to hear and decide the question presented by the petition. Plaintiff in error had a right to a judicial review of the proceeding, and the record must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order. Forschner & Co. v. Industrial Board, 278 Ill. 99, 115 N. E. 912. The record contains no fact or evidence upon which the order was founded but only the conclusion of the board that it was for the best interest of the parties that compensation be paid in a lump sum. Such a record practically deprives a party of any review of the proceeding.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

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SUPREME COURT OF ILLINOIS.

BARRETT CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12530.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF ACCIDENT.

Where the only notice of an accident given an employer was by the injured person at a time which he estimated to be from a month to two months after the accident, there was no evidence from which it could be found that notice was given within 30 days.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF ACCIDENT.

The Workmen's Compensation Act requires that notice of an accident be given the employer within 30 days, and this requirement is jurisdictional.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Error to Circuit Court, Peoria County; C. V. Miles, Judge.

Proceedings by L. O. Eagleton, administrator, under the Workmen's Compensation Act, to obtain compensation for the death of Henry Keefe. Opposed by the Barrett Company, the employer. There was an award by the Industrial Commission, which was set aside by the circuit court, and the claimant brings error. Affirmed.

Roscoe Herget, of Peoria, for plaintiff in error.

Frank M. Cox, of Chicago, and George W. Sprenger, of Peoria, for defendant in error.

DUNN, J., Henry Keefe died on December 19, 1916, and a claim for compensation for his death was presented under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) against the Barrett Company. The arbitrator found that notice of the accident was not given to the employer, and demand for compensation was not made upon it within the time required by the provisions of the act. The Industrial Commission reviewed this decision and made an award in favor of the claimant. Upon a writ of certiorari the circuit court of Peoria county set aside the finding of the commission, and the claimant has sued out a writ of error to reverse this judgment.

[1, 2] No one saw the supposed accident in which the deceased received his injury. There is no evidence in the record of such accident the statements of the deceased made to the foreman under whom he worked and the superintendent of the defendant in error's plant. The deceased was a paper maker and millwright, and had been employed by the defendant in error for 17 years. His death occurred from infection of his right hip and bone, which there is evidence tending to show had been caused by an external injury which did not break the skin. Dr. Trewyn began treating him some time in September. W. R. Holmes was the foreman under whom the deceased worked, and he testified that Keefe quit work on Saturday, September 23d; that he had complained

* Decision rendered, April 15, 1919 123 N. E. Rep. 29.

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for 3 or 4 weeks of having rheumatism, and on September 23d Holmes told him he had better stay home the next day and when he got well to come back. About a week later Keefe told him that he had been struck on the hip by a rag truck pushed by a negro employee of the defendant in error while he was engaged in his work. He could not state how long before the 23d the deceased told him he got struck, but as near as he could state in was a month or 6 weeks. He could not say whether it was less than a month. Hennessy, the superintendent of defendant in error, testified that Keefe came down to see him and said that he thought for a long time his trouble was rheumatism, but that he believed now it was due to being squeezed between the truck and the beaters. He said that the truck was moved or being pushed by some one and crowded him in between the truck and the beaters. He did not fix the time or any approximate time. He gave the approximate time as a month or 2 months. As to the time he had been struck by the truck he could not remember himself. This was all the evidence in regard to when the accident occurred.

The statute requires that notice of the accident be given the employer within 30 days, and this requirement is jurisdictional. Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496. Since there is no evidence in the record from which it can be found that notice was given to the employer within 30 days after the accident, the Industrial Commission was without jurisdiction, and its award was properly set aside.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

A. T. WILLETT CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12283.)

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REJECTION OF ACT—EFFECT.

If an employer's correspondence satisfied requirement of Workmen's Compensation Act as to due notice of its election not to come under the act for the year 1913, the employer would not be under its provisions for the years 1914-15, if it complied with other provisions as to posting notices within its place of business.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF REJECTION—SUFFICIENCY.

Unless a particular form of notice of rejection is prescribed by the Workmen's Compensation Act or by rules of Industrial Board under section 16 thereof, an actual written notice, which need not be in any precise or technical form, is all that is required under the statute.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

* Decision rendered, April 15, 1919. 122 N. E. Rep. 864.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REJECTION—SUFFICIENCY.

Where correspondence with the Industrial Board showed an employer's intent to give notice of its rejection of Workmen's Compensation Act, and where board, which had not adopted rules as to notices of rejection, did not inform employer, as requested, whether any further steps were necessary, the employer might assume that it had properly given notice to board, especially in view of a notation of a recall of rejection tending to show that its rejection was considered in force up to that date.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REJECTION—WRITING—"SIGNATURE."

Under Workmen's Compensation Act, requiring notice of rejection of its provision to be in writing, but not requiring notice to be signed in any particular way, and in view of absence of any rules or objection by Industrial Board as to any particular way of signing the notice, a notice made and signed in typewriting was a compliance with statute, as words printed or made legible by any other device are written, and as "signature" is act of putting down a man's name at end of instruments to attest its validity.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

(For other definitions, see Words and Phrases, First and Second Series, Signature.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POSTING OF NOTICES OF REJECTION—EVIDENCE.

Evidence *held* to show that an employer filing its notice of rejection of the provisions of the Workmen's Compensation Act had posted notices of the rejection in its place of business as required by the statute.

(For other cases, see Master and Servant, Dec. Dig. § 405[3].)

Error to Circuit Court, Cook County; Charles H. Bowles, Judge.

Application for adjustment of a claim filed by Anna Ulbricht, administratrix of Ernest Ulbricht, deceased, employee, with the Illinois Industrial Board, opposed by the A. T. Willett Company, employer. The Industrial Board, on review of the arbitrator's finding that applicant was not entitled to recover, awarded compensation, and on certiorari to the circuit court its finding was affirmed, and the employer brings error. Judgment of the circuit court reversed and cause remanded, with direction to quash the proceedings before the Industrial Board.

MacChesney, Becker & Angerstein and Luther F. Binkley, all of Chicago (Nathan William MacChesney, Thomas C. Angerstein, and George W. Angerstein, all of Chicago, of counsel), for plaintiff in error.

David K. Tone, of Chicago, for defendants in error.

CARTER, J. An application for adjustment of a claim was filed December 17, 1915, by Anna Ulbricht, administratrix of the estate of Ernest Ulbricht, deceased, with the Illinois Industrial Board, alleging that her husband died by reason of an accident arising out of and in the course of his employment by plaintiff in error, the A. T. Willett Company, and that she was entitled to compensation. The hearing was first had before an arbitrator designated by the board, who found that Mrs. Ulbricht was not entitled to recover as the plaintiff in error company was not operating under the Workmen's Compensation Act. On petition for review the Industrial Board held that said company was operating under

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the act and awarded compensation to the administratrix for Ulbricht's death. The cause was taken to the circuit court by writ of certiorari and the finding of the Industrial Board was affirmed. The circuit judge thereupon certified that the cause was one proper to be reviewed by this court, and it has been brought here by writ of error for further review.

The deceased was a teamster in the employ of plaintiff in error. He received severe injuries on October 9, 1915, from which he died the following day. Apparently he fell or was jolted from his wagon, which then ran over him; but the details of the accident do not appear.

Counsel for plaintiff in error insist that the proof shows that the company elected not to come under the provisions of the Workmen's Compensation Act of 1913 (Laws 1913, p. 335), which was in force at the time of the accident. The Industrial Board based its decision on the theory that plaintiff in error had not sent proper notice to the Industrial Board rejecting the Workmen's Compensation Act, as provided by the act of 1913; therefore it was under its provisions.

It appears from the record that after the act of 1913 was in force the following letter was sent to the plaintiff in error:

Chicago, Ill., July 24, 1913.

"Mr. David Ross, Bureau of Labor Statistics, Springfield, Ill.—Dear Sir: We elect not to come under the Compensation Act. Kindly furnish us the necessary information governing our disposition in the matter.

"Very truly yours,

"A. T. Willett Company."

The following reply was made to that letter by the Bureau of Labor Statistics:

"July 25, 1913.

"A. T. Willett Company, 75 East South Water St., Chicago, Ill.—Gentlemen: Yours of the 24th received, advising that you do not desire to come under the Compensation Act and asking for the necessary information governing the same. In reply, you are advised that the new Workmen's Compensation Act, effective on the first instant, creates an Industrial Board to administer the law and this department has no connection therewith. I would suggest that you address your rejection notice to the Industrial Board, which will be received here and turned over to that board when the same is appointed by the Governor, which I presume will be in a very short time.

"Yours very truly; David Ross, Secretary."

The plaintiff in error then sent the following letter to David Ross, of the Bureau of Labor Statistics, with inclosure addressed to the Industrial Board:

"Chicago, Ill., July 29, 1913.

"David Ross, Sec. Bureau Labor Statistics, Springfield, Ill.—Dear Sir: In accordance with your instructions we are enclosing herewith letter addressed to the Industrial Board for information governing concerns who elect not to come under the Compensation Act. We will be pleased to have you refer the attached letter to the proper authority.

"Thanking you for your attention in the matter, we are

"Very truly yours,

"A. T. Willett Company."

The inclosed letter was as follows:

"Chicago, Ill., July 30, 1913.

"Industrial Board, Springfield, Ill.—Gentlemen: We do not desire to come under the Compensation Act and will thank you for the necessary information governing same. A prompt reply will be appreciated.

"Very truly yours,

"A. T. Willett Company."

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It appears from the evidence taken before the Industrial Board on this hearing that said board was first organized under the act of 1913 on October 1st of that year; that the board after its organization had a book which it used for the information of the office but which was apparently not open to the public and in which notices of acceptance or rejections of the act were entered as they came in, and the notices were set aside until the board could decide what kind of a record the office would put into effect; that the first public record as to these matters was installed by the board some time in 1915; that the board had received correspondence transmitted by the Illinois Bureau of Labor Statistics with reference to the Workmen's Compensation Law after said board was organized, and among this correspondence was that received by David Ross hereinbefore set out. The secretary of the board testified that he could not tell how long this correspondence had been in the files of the board; that in July, 1915, the board put in a card system as to rejections of the Compensation Act and withdrawals of rejections; that under this system, when a letter came in stating that the signer withdrew his rejection and had decided to operate under the Compensation Act, the secretary would destroy the rejection card and make a new card showing the withdrawal of the rejection and file all the papers together; that the board had a card of withdrawal or rejection by the plaintiff in error company; that on this card kept in its office, at the top, was the word "Election," and on the next line below:

"A. T. Willett Co., 75 E. South Water St., Chicago.—Rejection withdrawn December 29, 1915."

The secretary also testified that he was unable to find the information book that was kept for the use of the board with reference to rejections and acceptances under the Workmen's Co: pensation Act and did not know where it was; that under the system of keeping this card system the card upon which was noted the withdrawal of rejection by the plaintiff in error company indicated that the board had had on file theretofore the rejection by said company of the Compensation Act; that this former card was destroyed; that the office would not make out any card where an employer came under the act automatically without taking some steps to reject it; that the board had no forms for notices of rejection of the act, or withdrawals of rejection, until late in the year 1913; that the order for the printing of regular forms of this kind was first made by the board October 7, 1913. The secretary also testified as to the envelope in which the papers with reference to the plaintiff in error's rejection and withdrawal of rejection were kept in his office and said envelope was offered in evidence.

It was stipulated that the letters sent to Ross and the letter to the Industrial Board above quoted were in typewriting and signed in typewriting. It does not appear that there was any other correspondence between plaintiff in error and the Industrial Board except that heretofore referred to, and there is no evidence indicating that the board, or any one for it, sent any notice to plaintiff in error with reference to the rejection of the Compensation Act and the withdrawal of such rejection.

[1] It is clear from this correspondence that the plaintiff in error company did not desire to come within the provisions of the Workmen's Compensation Act for the year following the correspondence, and under the construction of the act of 1913 by this court in Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627, if this correspondence satisfied the requirements of the act as to due notice, the said company would not be under the provisions of the act for the years 1914 and 1915, provided it complied with the other provisions of said act as to posting notices within its place of business. This latter question we will consider later. The principal question—as to whether said company had given due notice to the board—depends upon whether this correspondence of plaintiff in error with the Industrial Board

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and Bureau of Labor Statistics complied with the statute as to giving notice to the Industrial Board that plaintiff in error had elected not to come under the act.

[2, 3] Section 16 of the act of 1913, and of the present act, provides that the Industrial Board may make rules and orders for carrying out duties imposed upon it by law, and that such rules of procedure shall be as simple as reasonably may be. The record shows that at the time of this correspondence the board had made no rules or regulations as to notices of rejection or acceptance of the act. It is a reasonable conclusion from this correspondence of plaintiff in error that it intended thereby to give notice of its rejection of the act and requested information as to whether there were any other steps necessary to be taken by it in order not to come within the provisions of the act, and that the Industrial Board did not inform the company that any further steps were necessary to be taken. It would seem reasonable to conclude from this correspondence that the company had the right to assume from the failure of the Industrial Board to inform it that the notice was faulty, that it had properly given notice to the board of its desire not to come within the provisions of the act. We think it is apparent, also, from the record that the officials of the Industrial Board so understood from the filing of the correspondence and the further record on the card index system at the time plaintiff in error gave notice of its withdrawal of the rejection. The notation that the rejection was withdrawn on a certain date is a very strong argument that the rejection was considered in force up to that date.

We do not think there is merit in the argument of counsel for defendant in error that the failure of this correspondence to state definitely and in terms that the company wished these letters to be filed and notice that it desired not to come within the provisions of the act made the notice defective. Unless a particular form of notice is prescribed by the statute or by the rules of the board, actual written notice is all that is required under the statute. This was so held in construing a similar statute in Brost v. Whitall-Tatum Co., 89 N. J. Law, 531, 99 Atl. 315, L. R. A. 1917D, 71. The statute does not require the notice to be in any precise or technical form. Piatt v. Swift & Co., 188 Mo. App. 584, 176 S. W. 434.

[4] The statute requires the notice to be in writing. Counsel for defendant in error says that this notice, made and signed in typewriting, was not in compliance with the statute. It was held in construing the New York Workmen's Compensation Act in Hunt v. Dexter Sulphite Pulp & Paper Co., 100 App. Div. 119, 91 N. Y. Supp. 279, that the service of a typewritten notice under the Employers' Liability Act was the serving of a sufficient notice in writing; that typewriting has largely taken the place of handwriting and may well be considered as handwriting. In Ardery v. Smith, 35 Ind. App. 94, 73 N. E. 840, the court said:

"The word 'signature' is defined as 'the act of putting down a man's name at the end of an instrument, to attest its validity.' Bouvier's Law Dict. tit. Signature. 'Words traced with a pen, or stamped, printed, engraved, or made legible by any other device,' are written. Anderson's Law Dict. tit. Writing; Hamilton v. State (1885) 103 Ind. 96-98, 2 N. E. 299, 53 Am. Rep. 491. It being beyond question that the attorney had a right to sign the instrument, it cannot be material whether in doing so he used a pen or a typewriter."

Conceding, for the purposes of this case, that there is merit in the argument of counsel for the defendant in error that to allow these notices to be signed in typewriting would be to establish a practice that might permit fraud, particularly in case of a corporation, which must act by its officers, and that if the notices were permitted to be signed in typewriting the officers could come in thereafter and deny or approve the giving of authority to send them, there can be no question that the

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writing of the body of the notices in typewriting, under the authorities and on reason, constitutes a written notice, and the only serious question could be the signing of the notices in typewriting; but as neither the statute nor the rules of the board at that time required the notices to be signed in any particular way, and as no objection was made by the Industrial Board to these letters being signed in typewriting at the time they were received, we hold that the question of notices being defective because signed in typewriting cannot be raised on this record at this time.

The conclusion follows that the plaintiff in error company complied with the statute in giving notice to the Industrial Board that it had rejected the Workmen's Compensation Act, and that as no further action was taken by said company until after this accident happened, under the reasoning of this court in Victor Chemical Works v. Industrial Board, supra, and Reynolds v. Chicago City Railway Co. (No. 12337) 287 Ill. 124, 122 N. E. 371, the notice of rejection was still in force at the time of the accident.

[5] Counsel for defendant in error further argues that the record does not show that the plaintiff in error company posted notices of the rejection of the act in its place of business, as required by the statute. One of the employees of the company testified positively that he posted up such notices in its place of business and that the notices were still on the bulletin board of the company until after the accident. Others testified to seeing these notices posted in said place of business. Certain former employees of the company testified that while they were familiar with the bulletin board of the company they had never seen this notice posted thereon before the time of the accident. We think the weight of the testimony is clearly to the effect that these notices were posted in plaintiff in error's place of business, as required by the statute.

In vew of the foregoing matters the Industrial Board was without jurisdiction to make an award in favor of defendant in error in this proceeding.

The judgment of the circuit court will be reversed, and the cause remanded, with directions to quash the proceedings before the Industrial Board.

Reversed and remanded, with directions.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

ROOT DRY GOODS CO.

v.

GIBSON ET AL. (No. 10493.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL FROM AWARD.

The objection of insufficiency of evidence to support finding of Industrial Board will not be sustained on appeal, where there is some competent evidence to support each ultimate fact upon which the award is based.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

* Decision rendered, April 25, 1919. 123 N. E. Rep. 134.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—MAJORITY OF BOARD.

Under Workmen's Compensation Act, §§ 59-61, as amended by Acts 1917, c. 63, as to hearing and award by full board, after hearing before the full board an award made and signed by only a majority of the board is binding.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Industrial Board.

Claim under the Workmen's Compensation Act by H. Claire Gibson and others for death of Samuel H. Gibson, employee, opposed by the Root Dry Goods Company, employer. From an award by the Industrial Board, the employer appeals. Affirmed.

Chas. S. Batt and Walter S. Danner, both of Terre Haute, P. G. Henderson, of Indianapolis, for appellant.

F. S. Hamilton, of Greencastle, and Miller & Kelley, of Terre Haute, for appellee.

REMY, J. The findings of the Industrial Board which are material in determining the questions presented in this appeal are: That on February 15, 1918, appellant company was, and prior thereto had been, engaged in the conduct of a department store; that one Samuel H. Gibson was in the employment of appellant as a salesman, his work consisting chiefly in selling pianos and other musical instruments outside of the store; his only compensation being a specified commission on sales made by him, which commissions during the time of his employment averaged $18.53 per week; that under his employment he was subject to the direction of appellant, and was required, when requested so to do, to work inside the store; that on February 15, 1918, he was directed by appellant to take charge of the music department while the representative in charge of that department went to lunch, and by that representative was directed to remain in the store during the afternoon of that day; that while in the store in compliance with such directions, a call came from another department to lower an elevator which at times had been used by employees for the moving of merchandise from one floor of the store to another; that in response to the call the said Gibson reached in to the controller of said elevator, started it, and in doing so was accidentally caught by the elevator as it was descending, and was killed. It is further found by the board that the death of said Gibson was not due to intentional self-inflicted injury, and was not due to his use of intoxicants, to willful misconduct, nor to his refusal to use safety appliances. On this finding the board awarded his dependents, the appellee herein, compensation for 300 weeks at the rate of $10.19 per week, and ordered that appellant pay burial expenses, not exceeding $100.

Under proper assignments of error, appellant urges: (1) The insufficiency of the evidence to sustain the finding of the Industrial Board; and (2) that the award of the board is not valid, because made by but two members thereof.

[1] Keeping in mind the rules of law governing this court in passing upon the evidence in cases of this character (Haskell & Barker Car Co. v. Brown, 117 N. E. 555), we have carefully examined the evidence, and find that there is some competent evidence to support each ultimate fact upon which the award is based.

[2] Section 59 of the Workmen's Compensation Act (Laws 1915, c. 106), as amended by the act of 1917 (Acts 1917, p. 154), provides that the board, by any or all of its members, may hear and determine applications for compensation, and make awards. Section 60 of said act provides that where an award is made by fewer than all the members of the

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board, the party dissatisfied, if he makes application within seven days, may have a hearing "before the full board." Section 61 of the act contains the provision that an "award by the full board shall be conclusive and binding as to all questions of fact, but either party to the dispute may within thirty days from the date of such award, appeal to the Appellate Court for errors of law." The record shows that in the case at bar the evidence was first heard, and the award made, by one of the three members of the Industrial Board; that upon application duly filed a later hearing was held before the full board resulting in the finding and award from which this appeal is taken, which finding and award is signed by but two members of the board. It is the contention of appellant that the statute does not authorize a finding and award except by the full board, and that an award made and signed by only a majority of the board has no binding force. In this appellant is in error. The statute does provide that the hearing shall be before the full board, and the record shows that the hearing was so held. The statute does not provide that all members of the board must concur in a finding and award. If a hearing is before the full board, an award made and concurred in by a majority thereof is valid. There is no reversible error.

Judgment affirmed, and by virtue of the statute the amount of the award is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

CACA

v.

WOODRUFF. (No. 10487.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT.

Although Workmen's Compensation Act, § 9, expressly excepts casual laborers from the compensatory provisions of the law, yet under section 76, cl. b, defining "employee," a workman can recover compensation even though his employment is casual, if his employment is in the usual course of the employer's business.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"USUAL COURSE OF EMPLOYMENT"—"EMPLOYEE"—INDEPENDENT CONTRACTOR.

A carpenter, working by the hour and paid weekly by a miller to make additions and repairs at the mill under the miller's supervision, first working a few weeks in September and later returning to do more of the work in November, was within the Workmen's Compensation Act as an "employee"; the work being in the "usual course" of the miller's business, and the carpenter not being an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. §§ 362, 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

* Decision rendered, April 25, 1919. 123 N. E. Rep. 120.

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Appeal from Industrial Board.

Petition under the Workmen's Compensation Act by John H. Woodruff, employee, against Grant Caca, employer. From an award, the employer appeals. Affirmed.

Thos. E. Kane, of Noblesville, for appellant.

Gentry & Campbell, of Noblesville, for appellee.

McMahon, J. The appellee filed his petition with the Industrial Board for compensation under the Workmen's Compensation Law (Laws 1915, c. 106). He was awarded compensation at the rate of $9.90 per week during total disability, not exceeding 500 weeks, and $75 for medical and hospital services. The appellant has appealed from the award, and the error assigned and relied upon for reversal is " "that the award of the full board is contrary to law."

The facts, as shown by the evidence, are in substance as follows: During the months of September, October, and November, 1917, and prior thereto, the appellant was the owner and operator of a mill in Noblesville, Ind., in which he was engaged in the business of grinding wheat and corn and manufacturing feed stuffs; that during said time, and prior thereto, appellee was a carpenter; that in the early part of September, 1917, appellant desired to have a new room added to his mill and to make some repairs in the then existing mill building, and for that purpose employed appellee and another man to construct the said room and make the repairs, and agreed to pay them a fixed price per hour for their labor; that appellant was and did furnish all the material. When appellant employed appellee, appellant informed him that the new room and part of the old building was to be covered with tin siding if he could get it. The appellee and his fellow workmen undertook said work and worked under the direction and instruction of appellant. The appellant during the progress of the work visited the work three or four times daily, and made suggestions and consulted with appellee as to the method of doing the work. The construction of the additional room and making said repairs took between two and three week's time. This work consisted in taking the roof off a shed or driveway, which was a part of the mill building, and constructing a room above one end of the driveway, in the lowering of a floor, in building a stairway and changing and hanging a door, and in constructing bins for holding grain, flour, meal, and feedstuffs. The men doing the work were paid each Saturday for the work done during the week. About the time the new room and the repairs were completed, appellant informed the appellee that, when he procured the tin siding, he would let appellee know, as he wanted appellee to return and put it on. Some time in November the tin siding was procured, and appellant sent word to appellee to come and put it on. Appellee, with the other workman, returned and began putting on the siding, working two days, and while engaged in such work on the morning of the third day, and while standing upon a ladder, became overbalanced and accidentally fell, fracturing his hip. A discharging sore developed as a result of the injury, and it continued to discharge for a period of six months, and from the time of his injury to the time of the hearing before the Industrial Board appellee was wholly disabled for work. That an average weekly wage of $18 was being earned by appellee at the time of his injury. Appellant knew of the injury at the time, but failed to furnish a doctor, and appellee incurred an expense for that purpose of $75, within the first 30 days after the injury.

[1] The appellant contends that the appellee was a casual laborer and for that reason not entitled to compensation.

Section 9 of the Workmen's Compensation Act expressly excepts casual laborers from the compensatory provisions of the law.

Section 76, cl. b, of said act, provides that—

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"The word 'employee' shall include every person, including a minor, in the service of another under any contract of his or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."

It is quite clear that under our statute a workman can recover compensation even though his employment is casual, if his employment is in the usual course of the employer's business.

[2] The appellant was engaged in the milling business, the proper conduct of which required a building and machinery. Buildings and machinery used in such a business at times need to have additions and repairs made thereto. These additions and repairs must be expected and provided for. They are necessary in any business such as that in which appellant is engaged. The making of repairs was a necessary part of his business which he was required to anticipate when the necessity of his business demanded, or his convenience dictated. The Supreme Court of Wisconsin, in a case similar to the one at bar, in speaking of repairs said:

"Being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time and a usual concomitant thereof. They are foreseen, provided for, and made when necessary or convenient. The fact that one cannot exactly foretell just when they will have to be made is immaterial." Holmen Creamery Ass'n v. Ind. Com., 167 Wis. 470, 167 N. W. 808.

Work like that which the appellee was performing at the time of his injury is usual, and, in our judgment, is within the purview of the Workmen's Compensation Act.

The work which appellee was doing when injured being in the course of appellant's business, it is not necessary for us to enter into a discussion of the question as to who is, or who is not, a casual employee.

We hold that the appellee was not an independent contractor, that the work which he was doing when injured was in the usual course of appellant's business, and that the award of the board should be affirmed.

The award is affirmed, and, by virtue of the statute, the amount is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

GRANITE SAND & GRAVEL CO.

v.

WILLOUGHBY ET AL. (No. 10492.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CONSTRUCTION—INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Workmen's compensation acts should be given a liberal construction in determining whether injuries arose out of and in due course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

* Decision rendered, May 8, 1919. 123 N. E. Rep. 194.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES ARISING IN "COURSE OF EMPLOYMENT."

An injury occurs in the course of the employment within the Workmen's Compensation Act when it occurs within the period of the employment at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES ARISING IN COURSE OF AND OUT OF EMPLOYMENT.

Where an employee engaged in picking out dirt and foreign substances from gravel loaded into railroad cars by the employer remained in the car while it was moved away from the loading chute to allow the removal of a car and was injured by falling from the car while it was being switched, the injury was sustained in due course of, and arose out of, the employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by George Willoughby and others to recover compensation for the death of Cecil Willoughby, employee, opposed by the Granite Sand & Gravel Company, employer. From an award of compensation by the Industrial Board, employer appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.
Salem D. Clark, of Indianapolis, for appellees.

NICHOLS, J. This was an application by the appellees as dependents of Cecil Willoughby against the appellant for the adjustment of their claim for compensation under the Workmen's Compensation Act (Laws 1915, c. 106), wherein it was claimed that said Cecil Willoughby died as a result of an injury arising out of and in the course of his employment by appellant.

As appears by the board's findings, the material facts are that:

On the 15th day of June, 1918, one Cecil Willoughby was in the employment of the defendant at an average weekly wage of $18; that at the said time the defendant was engaged in the operation of a gravel pit from which it was shipping gravel; that leading from a main railroad track a switch led into the premises occupied by the defendant and over which it shipped gravel; that the defendant loaded cars by means of a chute through which it conveyed the gravel into the cars; that as cars were thus loaded they were pushed down the switch and away from the main track, and another car was brought under the chute for the purpose of loading; that because of such condition of cars it became necessary when loaded cars were to be removed at a time when a car was in the process of loading, to remove such car from under the chute in order that the loaded cars might be removed; that as the gravel was conveyed into the car the defendant had employees therein to pick out dirt, sticks, and foreign substances; that the said Cecil Willoughby was employed for such service on the 15th day of June, 1918, was engaged therein, and in the discharge of said duties was standing in a car picking out sticks, dirt and foreign articles from the gravel that was being conveyed therein through the chute; that while the said Cecil Willoughby was so engaged the railroad swithching crew desired to remove the

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loaded car; that in company with another employee, who was also working in the car with him, the said Cecil Willoughby got out and assisted to raise the chute so that the cars could be removed; that after raising the chute the said Cecil Willoughby re-entered the car in which he had been working, and while said car was being switched by the railroad switching crew the said Cecil Willoughby was accidentally thrown out of said car, which ran over his body, inflicting injuries which resulted in his death on said date; that the defendant had at no time instructed the said Cecil Willoughby that he should not remain in the car in which he was employed to work when it was being switched; that the defendant had actual knowledge of the injury and the death of the said Cecil Willoughby at the time of the occurrence; that the said Cecil Willoughby left surviving him the appellees as his dependents.

On those findings there was an award against the appellant of 300 weeks' compensation at the rate of $9.90 per week, beginning June 15, 1918, and an order to pay burial expenses not to exceed $100. From this award an appeal was prayed, and granted to this court. The only error relied upon for reversal is that the award of the full board in said cause is contrary to law.

[1] It has been held by the courts, elsewhere, as well as in this state, that the Workmen's Compensation Acts should be liberally construed, and should be given a broad and liberal construction in order that the humane purposes of their enactment may be realized, and this is certainly true in determining whether an accident that produced injury arose out of and in due course of the employment. Holland-St. Louis Sugar Co. v. Shraluka, 116 N. E. 330.

[2] An injury occurs in the course of the employment, within the meaning of the Compensation Act, when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it. In re Ayres, 118 N. E. 386; N. K. Fairbanks Co. v. Industrial Commission of Ill., 285 Ill. 11, 120 N. E. 457.

[3] In this case, the employee's duties required him to work inside of a railroad car standing on a switch, at a chute from which the car was being loaded. It became necessary to remove the car from the chute in order that certain cars behind it might be taken away. After assisting in lifting the chute, he re-entered the car and stayed with it while it was away from the chute, until he was injured. He was in the place where his duties required him to be, and ready to commence them as soon as his car was reset at the chute. The appellant by its superintendent knew that sometimes the men remained in the car, but never gave them any instructions concerning what they should do while the car was being moved. No instructions were given to the decedent as to what he should do while his car was being moved, though such conduct could have been prohibited if deemed improper. It is not unreasonable that he believed, and we hold that he had a right to believe, that he was in his proper place when he was in the car where his duties required him to be as soon as the car was in proper position again. We hold that Cecil Willoughby received the injury that resulted in his death, while in the due course of his employment, and that his injury and death grew out of his employment.

The award of the Industrial Board is affirmed, with 5 per cent pentalty as provided by statute.

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APPELLATE COURT OF INDIANA.

DIVISION No. 1.

MUNCIE FOUNDRY & MACHINE CO.

v.

THOMPSON. (No. 10497.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—RELATION OF PARTIES—"INDEPENDENT CONTRACTOR"—"EMPLOYEE."

Foundry worker unloading coke from freight cars for a certain sum per ton is an "employee," and not an "independent contractor," where there is no contract to unload certain number of tons or work for certain period of time; worker having right to quit and foundry company having right to discharge him at any time without liability (citing Words and Phrases, First and Second Series, Employee; Independent Contractor).

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FINDINGS OF INDUSTRIAL BOARD.

In proceedings under Workmen's Compensation Act, Industrial Board must find as legal basis for an award that claimant was an employee, that he received an injury by accident, that the accident arose out of and in course of the employment, the character and extent of the injury, and the claimant's average weekly wage.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act (Laws 1915, c. 106), by Joshua Thompson for compensation for injuries, opposed by the Muncie Foundry & Machine Company. From award by Industrial Board, employer appeals. Reversed and remanded, with directions.

Joseph W. Hutchinson, of Indianapolis, for appellant.
Cromer & Long, of Muncie, for appellee.

ENLOE, J. The record in this case discloses: That on the 8th day of July, 1918, the appellee began working for appellant, at its plant at Muncie, Ind., unloading coke from the freight cars in which it was shipped to the plant, into the "bins" of appellant at said plant; that this coke was shoveled from the car into the hopper of a conveyor, by which it was carried and dumped into the bins; that appellee was working under an agreement, at the time of his injury, by which he was to receive as compensation for his labor 40 cents per ton for the coke unloaded; that prior to the time of receiving the injury complained of, he had been assisted in unloading said coke by two other persons, one of whom assisted in unloading two cars, and the other person assisted on one car; that appellee had been doing this work without any help or assistance from any other person for several days before he was injured; that on July 19, 1918, appellee was at the plant of appellant unloading a car of coke, and, while so at work, he observed that the conveyor had

* Decision rendered, May 9, 1919. 123 N. E. Rep. 196.

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stopped, and thinking it had become clogged, thereby causing it to stop, he opened a door thereon to investigate the matter; he found some pieces of coke on the belt, and in attempting to remove them his hand was caught and he was injured; that as a result of the injury he lost the thumb of his right hand by amputation, the crushing of the bones of the hand, and a lasceration of the tendons and soft tissues thereof, all of which resulted, as found by the Industrial Board, in a "75 per cent. impairment of the natural use and function of the whole right hand"; that the average weekly wage of the appellee was in excess of $24. The Industrial Board further found:

"That the plaintiff's injury was not due to any wilful misconduct upon his part, and was not in violation of any specific instruction given to him by the defendant."

A hearing was first had before one member of the board, and afterwards, on due application by appellant for review of the proceeding, a review was had by the full board, and on such hearing the board awarded compensation to appellee at the rate of $13.20 per per week, for 112½ weeks, beginning July 28, 1918, and from that award this appeal is prosecuted.

The error assigned is that the award of the full board in said cause is contrary to law.

Under this assignment the appellant urges three propositions, viz.:

(1) "The finding of the full board is not sustained by sufficient evidence. The specific point to which we call the court's attention is that the full board found that appellee was in the employment of appellant; whereas, in truth and in fact he was not an employee of appellant, but an independent contractor."

[1] With this contention we cannot agree. It is frequently said in the cases that—

"To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to lay down on this subject are not always simple of application."

See Independent Contractor, Words and Phrases, vol. 4, p. 3542.

What contract, as an independent contractor, did the appellee have with appellant? How many cars must he unload at 40 cents per ton, before his contract would be complete? Or during what period of time was he, under his contract, to unload cars for appellant? As to each of these questions there is no answer found in the record favorable to appellant.

Contracts are entered into for the purpose of acquiring rights, on the one hand, and imposing obligations on the other. Could appellee, under the evidence in this case, as shown in this record, have quit work at any time, without incurring any legal liability to appellant? Could appellant at any time discharge the appellee without incurring any legal liability to him to respond in damages for breach of an alleged contract? To these questions upon the record before us we answer that there could be no such liability. The appellee could cease labor for appellant at any time he chose, and appellant had the right to discharge him any time it chose. Appellee's pay, instead of being measured by the hour, day, week, or month, was, by this contract, to be measured by the ton of coke unloaded; but he was none the less a laborer, in the employ of the appellant, doing appellant's work at the time he received the injury in question.

Appellant next insists that the facts found are not sufficient to sustain the award, because:

(1) There is no finding that the appellee was in the course of his employment at the time he received the injury upon which the award is based; and

(2) There is no finding of facts which shows that the injury complained of and upon which the award is based, arose out of the employment.

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This contention is well taken. The board is, by the statute, required to find the facts upon which it bases an award. There is not, in this case, and general finding that the injury sustained by him was received by accident arising out of and in the course of the employment, as servant of appellant.

[2] In cases of this character, there are five facts which must be found as a legal basis for an award of compensation, viz:

(1) That claimant was an employee.

(2) That he received an injury by accident.

(3) That the accident arose out of and in the course of the employment.

(4) The character and extent of such injury.

(5) Claimant's average weekly wage.

The cases of Inland Steel Co. v. Lambert, 118 N. E. 162, and Retmier et al. v. Cruse, 119 N. E. 32, in so far as they each are at variance with the views herein expressed, as to the findings to be made by said board are hereby disapproved.

For the failure of the board to find the facts necessary to sustain its award, this cause is reversed and remanded to said Industrial Board, with directions to restate its findings of fact, and for further proceedings not in conflict herewith.

Award is reversed.

APPELLATE COURT OF INDIANA.

ROGERS ET AL.

v.

ROGERS ET AL. (No. 10470.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEATH "ARISING OUT OF EMPLOYMENT."

Where employee of a firm of contractors was killed while conveying workmen from one camp to another at the direction of one of the firm, a duty he had been accustomed to perform, the death "arose out of the employment."

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

4. MASTER AND SERVANT—TERMINATION OF EMPLOYMENT—DISOBEDIENCE.

Generally, employee's disobedience of master's orders justifies a peremptory dismissal.

(For other cases, see Master and Servant, Dec. Dig. § 30[5].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EMPLOYMENT—ESTOPPEL.

Employer who directed employee to convey workmen to certain camp will be estopped from claiming, upon employee's death in the performance of such duty, that employee was acting for the private benefit of an individual member of the firm.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

* Decision rendered, April 18, 1919. 122 N. E. Rep. 778.

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8. MASTER AND SERVANT— CONTRACT OF EMPLOYMENT—COMPENSATION.

In view of Workmen's Compensation Act, § 4, employer's obligation to pay and employee's right to receive compensation in accordance with such act becomes a part of every contract of service between every employer and employee covered by the act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PRESUMPTION.

That deceased was a son of a member of the employer firm created no presumption affecting the right to compensation under Workmen's Compensation Act, where he had been long emancipated and at time of death was living with his wife and children.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Edna Rogers and others for compensation for the death of Horace M. Rogers, opposed by John S. Rogers and another as employer. Order of Industrial Board denying award, and claimants appeal. Reversed, and board directed to make an award of compensation.

Lee & Lee and Rufus H. East, all of Bloomington, for appellants.

Robert G. Miller and James W. Blair, both of Bloomington, and L. K. Babcock, of Indianapolis, for appellees.

DAUSMAN, C. J. On the 5th day of June, 1917, one Horace M. Rogers was driving an automobile on a public highway. The automobile was accidentally overturned, the machine and driver both falling into a ditch. While held down by the automobile, he died by suffocation or drowning. The appellants, his widow and five children, applied to the Industrial Board for an award of compensation on the ground that his death arose out of his employment with the firm of Rogers & Brown. A hearing before one member of the board resulted in an award at the rate of $10.45 per week. The appellees procured a review by the full board. On June 22, 1918, the full board reviewed the evidence and heard the argument of counsel, and thereupon took the matter under advisement. On July 15, 1918, the board made the following entry of record:

"That it is unable to determine with certainty whether Horace Rogers, at the time he received the injuries resulting in his death, was working for John S. Rogers and Luther Brown as a partnership, or was working for John S. Rogers individually. To the end that this point may be made definite and certain by evidence, said cause is continued for further hearing upon review, and the parties are hereby given permission to introduce additional evidence."

On September 16, 1918, additional evidence was introduced, and the matter was again taken under advisement.

On November 1, 1918, the Industrial Board, by a majority of its members, denied an award and ordered that the appellants take nothing by their complaint and that they pay the costs of the proceeding. The minority member of the board was of the opinion that on the facts the appellants are entitled to an award.

There is no controversy whatsoever concerning the following evidential facts:

"John S. Rogers and Luther Brown were partners, engaged in the business of constructing and repairing highways in the firm name of Rogers & Brown. The firm had contracts for the construction of at

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least two roads in Monroe county. One of these roads is known as the Dolan road, and the other is known as the Harrodsburg road. As a matter of convenience and expediency, the members of the firm divided their work. Rogers had charge of the work on the Dolan road, and Brown had charge of the work on the Harrodsburg road. Each member of the firm owned, as his individual property, a Ford roadster. The firm owned as firm property, a motortruck and some teams. Each member of the firm also owned some teams individually. Three teams were in use on the Dolan road. Brown had about 20 men working under him on the Harrodsburg road. Whenever on account of rain it became too wet to work down at the Harrodsburg job, Brown and his entire crew would come up to the Dolan road, where they would work until conditions would permit them to resume at the former place. Sometimes John S. Rogers and the men under him would go down to the Harrodsburg road and work there.

"Horace Rogers was a son of John R. Rogers, and was about 29 years of age. He had a wife and five children with whom he lived as head of the family. He had been employed by Rogers & Brown ever since the firm was organized in 1915. He acted as a sort of general helper. He would run the drill, boss the quarry, direct the workmen, and do whatever the firm had for him to do. He had no regular hours for beginning or quitting work. Sometimes he would get up at 3 o'clock in the morning and load the holes and shoot them. He sometimes hauled coal on the truck. Sometimes he would start at 9 o'clock or later in the evening to take supplies on the motortruck from Bloomington to the camps. The Dolan camp was about 6 miles north, and the Harrodsburg camp was about 15 miles south, from Bloomington. He would use either automobile, or the truck, as convenience required, in the business of the firm. He would convey men and supplies back and forth between town and camps, and that was part of his work. During the progress of the work on the Harrodsburg road, he spent practically all of his time there with Mr. Brown. He had more experience in road building than Mr. Brown, and the latter relied on him for advice. The firm paid him $15 per week and board at the camp. The board was worth $4 per week. His wages had been paid him uniformly by the firm of Rogers & Brown.

"On the night of April 4, 1918, it rained so that it became too wet to work. The next morning Horace went to Bloomington to register for military service, and Mr. Brown went with him. They arrived at Bloomington about 11 o'clock a. m. At noon Horace went to his own home for dinner. After he had registered, he and Brown bid on a road contract which the county commissioners were letting on that day. The bids were opened at 2 p. m., and their bid was rejected. About 4 p. m. he showed Brown his registration card and said jokingly that he would not need that road contract, for he would have to go to war. Then Brown and Horace went to a garage. At the garage Horace said to Brown: 'I will go and take the men out there. How long will you be gone?' Brown answered, 'Not very long.' Horace replied: 'Well, if I am not back when you get back, you wait here, and I will meet you, and we will go back to the work at Harrodsburg.' Then Horace took his father's car and started to the camp at Dolan, to take the men out there. Brown waited for him until supper time. Then, supposing that Horace had gone to his own home to get supper, as he sometimes did, Brown stepped into a picture show. Soon after entering the picture show, Brown was informed of the accident.

"Two other workmen went from the Dolan camp to Bloomington that morning to register for military service. One of them, Andy Walke, worked on the Dolan job part of the time, and part of the time on the Harrodsburg job. At this particular time he was up north of town on the Dolan job. In addition to his work on the road, he was also stable boss at the Dolan camp. It was his duty to see that all the horses there had

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proper care. John S. Rogers was in Bloomington that morning, but left at 10:10 a. m. for Osgood. Before departing he left instructions for his son Horace to take his Ford roadster and convey the two workmen from Bloomington to the Dolan camp. He was anxious about the matter and wanted to be sure that Walke would be at the camp that evening to care for the horses. In obedience to this order, Horace took the two men to the Dolan camp, intending to return to Bloomington and from there to go to the Harrodsburg camp. On his way back, the road being wet and slippery, the machine skidded and turned over, resulting in his death. The firm of Rogers & Brown carried insurance for the benefit of their employees in accordance with the Workmen's Compensation Act [Laws 1915, c. 106]."

[1] From the facts as above stated, there is but one legitimate conclusion to be drawn, viz., that the death of Horace Rogers arose out of the employment with the firm of Rogers & Brown. It will be observed that for a considerable time he has been constantly employed by the firm of Rogers & Brown, and that his wages had been paid uniformly by the firm of Rogers and Brown. When the nature of the work which he had been doing from day to day for that firm is taken into consideration, the presumption naturally arises that while conveying the workmen to the camp and returning therefrom, in obedience to the order given by a member of that firm, he was performing a service which pertained to the firm's business. Each member of the firm stated repeatedly in his testimony that Horace Rogers was in the employment of the firm at the time of his death. As between the firm and the dependents of the deceased, we perceive no reason why an agreement for compensation should not have been made in accordance with section 57 of the Workmen's Compensation Act.

But Horace Rogers was a son of John S. Rogers, and a strong friendship existed between Horace and Luther Brown. Apparently, these circumstances generated a suspicion of collusion as against the insurance carrier. The insurance carrier was made a defendant in the proceeding before the Industrial Board and is named as an appellee in this court. From all the circumstances of the case, we must assume that the attorneys appearing of record for the appellees really represent only the insurance carrier. Accordingly, the hearing was devoted to the single purpose of testing the truthfulness of the admissions made by the members of the firm. The hearing was continued for the express purpose of procuring evidence which would definitely settle the question whether the deceased was an employee of the firm or an employee of John S. Rogers at the time the fatal accident occurred. After two months the hearing was resumed; but the evidence then presented was not of a character to furnish much additional light on that question.

In addition to the facts above stated, the evidence discloses without conflict that John S. Rogers had an arrangement with his partner whereby he received pay for the use of the teams owned by him when used in the partnership business. His compensation for his teams was computed by the hour for the time they actually worked for the firm. He paid from his individual funds for the feed consumed by all the horses at the Dolan camp and also paid from his individual funds various other items of expenses occasioned by the work there. Brown managed the business at the Harrodsburg camp on the same plan. From time to time the two partners would "get together" and adjust their accounts. By these periodical adjustments each partner would "get back" his individual money so expended.

The evidence is confusing and uncertain as to how Mr. Walke was paid in the first instance. John S. Rogers paid him; but whether he paid him from his individual funds, or by the firm's checks, is not clear. The evidence as to the ownership of the teams at the Dolan camp is also con-

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flicting; and whether all of them belonged to Rogers, or part of them to Rogers and part to the firm, is not clear.

The method of conducting the firm's business evoked a series of questions. In whose employment was Mr. Walke? If John S. Rogers paid Mr. Walke from his individual fund, would not that fact make Mr. Walke the employee of John S. Rogers as an individual? If Mr. Walke was the employee of John S. Rogers as an individual, does it not follow logically that Horace Rogers was in the employment of John S. Rogers when taking an employee of John S. Rogers to the partnership camp on the Dolan road and while returning therefrom?

[2] It is unnecessary to determine whether Mr. Walke was the employee of the firm or an employee of John S. Rogers. If Mr. Walke were asking compensation for an alleged injury arising out of his employment with the firm of Rogers & Brown, and if his right to compensation was being contested on the ground that he was not an employee of the firm, then his status as an employee necessarily would have to be determined; but in the case at bar it is wholly irrelevant. When a member of the firm directed Horace Rogers to take Mr. Walke to the Dolan camp, it was his duty to obey. There was no obligation resting on him to inquire whether the performance of that duty would inure to the benefit of the firm. That question was no concern of his. It would be an unjust and unreasonable rule that would have required him to decide that question at his peril. The presumption is that the master knows his own business, and it is the exclusive province of the master to determine questions of that character for himself.

[3-5] It is the duty of an employee to yield obedience to all reasonable orders and instructions of his employer. This rule is fundamental. Disobedience, as a general rule, justifies a rescission of the contract of service and the peremptory dismissal of the employee. 18 R. C. L. 520. As between Horace Rogers and the firm, it is immaterial whether Mr. Walke was an employee of Rogers & Brown, or John S. Rogers, or whether he was anybody's employee. The direction given to Horace to convey the workman to the Dolan camp was reasonable; it called for a service of the kind he was accustomed to render for the firm; and it was his plain duty to perform it. As between him and the firm, the latter cannot be heard to say that the performance of that duty was for the private benefit of an individual member thereof.

[6-8] The relation of employer and employee is contractual. Like every other contractual relation, it is the product of a meeting of the minds. Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 South 553, 132 Am. St. Rep. 38; 18 R. C. L. 490. To create the relation of employer and employee there must be an express contract, or such acts as will show unequivocally that the parties recognize one another as master and servant. 18 R C. L. 493. It is essential to the existence of every contract of employment that it be definite and certain as to parties. Parsons v. Trask, 7 Gray (Mass.) 473, 66 Am. Dec. 502. By virtue of section 4 of the Workmen's Compensation Act, the obligation of the employer to pay, and the right of the employee to receive, compensation in accordance with the provisions of said act, becomes a part of every contract of service between every employer and employee covered by said act. Acts 1915, p. 393; Hagenback v. Leppert, 117 N. E. 531. To the employee this right to compensation is a precious element of the contract. One of the considerations and an important one, which he gives for that right, is the relinquishment by himself and his dependents of all other rights and remedies at common law or otherwise for his injury or death arising out of the employment Section 6, W. C. C. A contract of this character will not be lightly overturned.

[9] The relation of employer and employee, having been created by the voluntary act of the parties, usually must be terminated by the parties. It may be terminated, of course, by the [illegible] illness, or insanity

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of either party; by the expiration of the term fixed in the contract; or by mutual consent. The employer may dismiss his employee at any time for cause, or arbitrarily and without cause. The employee may quit the service of his employer at any time for cause, or arbitrarily and without cause. Of course, in some instances there may be liability for damages resulting from breach of contract; but that feature is not here involved.

In the case at bar there is nothing in the evidence tending to indicate an intention on the part of any person concerned to terminate the relation of employer and employee which had long existed between Horace Rogers and the firm of Rogers & Brown, or to indicate a mutual understanding that the particular service rendered by him should be regarded as outside the regular employment. Therefore we must and do hold that from the time he started the automobile on the trip to the Dolan camp, to the time of his death, he was in the regular and usual employment of the firm of Rogers & Brown.

[10] Horace Rogers was not a member of his father's family. He had been long emancipated and was living with his wife and children. No presumption arises out of the mere relation of father and son which can have any influence on the case at bar. There is no evidence to show that the relation of father and son has any bearing whatever on the controversy.

The action of the Industrial Board is reversed, and said board is directed to make an award of compensation.

Batman, P. J., did not participate.

SUPREME COURT OF IOWA.

BACH

v.

INTERURBAN RY. CO. (No. 31860.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SETTLEMENT.

A written contract between employer and dependent widow of deceased employee in which parties had voluntarily fixed earnings of deceased, the amount of compensation, and the time it should be paid, at instance of insurer, as employer's agent, in compliance with statute, which was performed for a time, was a settlement, though not mentioning whether parties were engaged in interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—SETTLEMENT—MISTAKE.

Employer's misconception as to whether it should have been proceeded against under Workmen's Compensation Act or federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), or its ignorance of the law was not such a mistake as would authorize the setting aside of a partly performed settlement made under state law between employer and employer's dependent widow.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

*Decision rendered, April 12, 1919. 171 N. W. Rep. 723.

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7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF EMPLOYMENT—ESTOPPEL BY AGREEMENT.

Where employer and widow of deceased employee entered into a settlement pursuant to Workmen's Compensation Law which was partly performed when insurer stopped payment because of its claim that deceased was engaged in interstate commerce, it was estopped to assert that the injury did not arise out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

Appeal from District Court, Dallas County; W. H. Fahey, Judge.

This is a suit brought in equity, under section 2477b33, Code Supplement, for a decree effectuating a memorandum of settlement under the Compensation Act, entered into between the employer and the widow dependent of a deceased employee. A decree was entered as prayed, and the defendant appeals. Affirmed.

Chandler Woodbridge, of Des Moines, for appellant.

Stipp, Perry, Bannister & Starzinger, of Des Moines, for appellee.

PRESTON, J. The petition, after stating the plaintiff's relation to the deceased as widow and sole dependent, the corporate capacity of defendant, the nature of the employment of deceased by defendant, the facts in relation to the injury and death of deceased, the average annual earnings and weekly wages due under the Compensation Act (Code Supp. 1913, §§ 2477m to 2477m51), and the amount due plaintiff as widow under said act, alleged that at the time of said accident and prior thereto defendant had elected to come under the provisions of the Iowa Workmen's Compensation Act, and that it had insured its liability under said act, in the London Guarantee & Accident Company, Limited; that deceased had not rejected the terms of said act, but was working for defendant under its terms; that defendant reported the injury and death of deceased to the Industrial Commissioner of Iowa pursuant to the terms of said act; that this report is dated April 13, 1916; that about May 8, 1916, said defendant and said insurance company made a settlement with plaintiff under said Compensation Act, wherein said defendant and insurance company agreed to pay surgical and hospital relief in the sum of $100, and in addition thereto the sum of $9.19 per week during 300 weeks, and that thereupon said defendant and plaintiff executed a written memorandum of settlement which is attached and made part of the petition; said memorandum of settlement was duly filed with the Iowa Industrial Commissioner May 15, 1916, by said defendant and insurance company, and which was duly approved by the Iowa Industrial Commissioner May 20, 1916; that, pursuant to said settlement, defendant and said insurance company paid doctors bills and funeral expenses in the sum of $100, and thereafter paid plaintiff the weekly sums provided as follows: May 11, 1916, $45.95, compensation from April 11, to May 15, 1916; May 16, 1916, $18.38, compensation to May 29, 1916; May 30, 1916, $18.38, compensation to June 12, 1916: that no other payments have been made; that plaintiff presents to the court a duly certified copy of the memorandum of settlement and all papers in connection therewith, and made the same a part of the petition; that the injuries of deceased were caused solely by the negligence of a third party driving an automobile, and were in no manner caused by any negligence on the part of the defendant. Plaintiff prayed that the court render and enter decree in accordance with the terms of said memorandum, and that the parties be notified, and for general equitable relief.

The answer admits its corporate organization, and that plaintiff is the widow of deceased, the employment, the accident, and death, admits

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that deceased was struck and killed by an automobile owned and driven by a stranger, admits that both deceased and defendant were subject to the Iowa Compensation Law, so far as the same might be applicable, and no further, admits defendant had insured its liability as alleged, admits the average weekly wages of deceased, admits that a correct copy of the memorandum of settlement is attached to the petition, and that it was signed by defendant's insurer, and compensation paid to plaintiff as alleged. Defendant denies it ever made any settlement with plaintiff, alleges its insurer signed said memorandum under mistake and misinformation, and, when correctly informed as to the facts, payment of compensation was stopped, that both deceased and defendant were engaged in interstate commerce at the time deceased was injured, and all the rights and liabilities of the parties are fixed by the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), and that the parties were not subject to the Iowa Compensation Law, and, further, that the injury did not arise out of the employment. For reply, plaintiff says that after defendant entered into a settlement, pursuant to the terms of the Iowa law, and after making partial payment and compensation, it refused to further carry out said agreement, because of the alleged specific fact that deceased was engaged in interstate commerce, and by reason of refusing further payment on this specific ground defendant is estopped from asserting that the injury did not arise out of the employment; that the settlement was voluntarily made after full investigation of all the facts by an agent of defendant and its insurer, and partial payment carried out, and thereby defendant is estopped.

The case was tried on an agreed statement of facts, the testimony of two witnesses, and certain exhibits offered by plaintiff. The stipulation of the facts, in so far as it relates to questions now presented, omitting matters admitted in the answer, is substantially this: That on and prior to April 10, 1916, deceased was in the employ of defendant company as conductor on a line car, and the crew operating said car were engaged in repairing defendant's line wires, poles, and all overhead work on the entire road from Colfax, Iowa, to Des Moines, and Perry, Iowa, and said crew were the general repair and line men; that on said date this crew including deceased, were operating said line or repair car, near the town of Perry, and were engaged in the work of removing an aluminum feed wire and replacing the same with a copper feed wire, which, feed wire furnished the electrical power by which all of defendant's cars, engines and trains were operated from Des Moines to Perry. The crew were working near Perry about 11 o'clock a. m. on said day, when deceased received orders from the dispatcher to place the line car on a switch track near the Perry depot, to allow a passenger car to pass on its regular trip. Then follows a detailed description of the location of the switch, tracks, depot, and the course followed by deceased in going to the depot. Continuing, it states that in the course of his duties deceased walked from the line car on the siding to defendant's depot to get orders from his line foreman as to what part of the work to do next after the passenger car had passed; that as soon as he received his instructions he left the depot to go back to his car, when one Mortenson, driving an automobile, struck deceased, causing deceased's head to strike the rail of the track, crushing his skull, dislocating his neck, and causing instant death; that said Mortenson sustained no relation either to deceased nor defendant company of any kind. The details as to just where deceased was and how he was struck are stated. Continuing, it is stated:

That "the said London Guarantee & Accident Company, Limited, which at all times carried the compensation insurance for said defendant, by C. W. Walters, its claims adjuster and agent, executed a memorandum of settlement with the plaintiff according to the terms, schedules, and provisions of said Iowa Compensation Act, for compensation supposed to be due to plaintiff under said act, and prepared a 'memorandum of settle-

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ment' in the manner and form as prepared and published by the Iowa Industrial Commissioner, which the plaintiff then signed, and to which the name of defendant, Interurban Railway Company was then signed by said C. W. Walters as aforesaid, in the name and upon behalf of the Interurban Railway Company; that on or about June 30, 1916, defendant and said insurer refused to pay further compensation to the plaintiff, and refused further to carry out the terms of said 'memorandum of settlement' upon the ground, as then stated to said plaintiff and said Industrial Commissioner, that said Bach was at the time of said accident and death engaged in interstate commerce, and his case was covered by the federal Employers' Liability Act, and not by the Iowa Workmen's Compensation Act. The plaintiff, however, does not by this stipulation in any manner concede either that said Bach was engaged in interstate commerce at the time of his death, or that the liability arising, if any, is covered and governed by said federal Employers' Liability Act, but contends that the case falls within, and is governed by, the Iowa Workmen's Compensation Act. Dated this 9th day of September 1916."

The Iowa Industrial Commissioner certified to the memorandum of settlement July 12, 1916. This suit was brought August 25, 1916 and the trial was had in September, 1916. The memorandum of settlement is in writing and signed by Interurban Railway Company, employer, and by Mrs. C. A. Bach, widow dependent, and was filed May 15, 1916, and approved May 20, 1916, by the Iowa Industrial Commissioner. It recites that the injury arose out of and in the course of the employment and states how deceased was injured. It fixes the average annual earnings and the weekly wages and stipulates for the amounts to be paid and the length of time. One of the receipts given by plaintiff to the defendant is as follows:

"Claim No. 73059.

"Receipt for Partial Payment of Compensation.

"Received of Interurban Railway Company the sum of forty-five and 90|100 dollars ($45.95), said payment being that part of my weekly wages due me under the provisions of the Workmen's Compensation Law of the state of Iowa for the period of five weeks from April 11, 1916, to May 15, 1916 (inclusive), on account of injuries sustained by me on or about April 10, 1916. [Signed] Mrs. Dora Bach.

"Address: 3002 S. W. 10th St., Des Moines, Iowa.

"Dated at Des Moines, May 11, 1916.

"Witness: C. W. Walters."

June 30, 1916, the Iowa Industrial Commission was notified as follows:

"Des Moines, Iowa, June 30, 1916.

"Hon. A. B. Funk, Des Moines, Iowa—Dear Sir: Interurban Ry. Co.—Charles A. Bach, Dec'd. I beg to call your attention to the fact that in the above case we have decided not to pay further compensation, the deceased and his employer having at the time of his injury been engaged in interstate commerce, within the well-known decisions of the United States Supreme Court, and also in our own state Supreme Court in the case of Ross v. Sheldon [176 Iowa, 618] 154 N. W. 499.

"At the time we made the memorandum of settlement in this case we had been investigating the question of whether or not the injury arose out of the employment. Having concluded that it did, we overlooked the interstate commerce theory, and through mistake on the part of myself personally the memorandum of settlement was made.

"Yours very truly,

"[Signed] Chandler Woodbridge."

To this communication the commissioner responded in writing that he was of the opinion that the agreement for the statutory compensation would stand and be enforceable.

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On July 3, 1916, Mr. Woodbridge notified the plaintiff in writing that she would not be paid any further compensation on the ground, as stated therein, that the Iowa Compensation Law, as he viewed it, does not cover the case of her husband, on the ground that he and defendant were engaged in interstate commerce, and that her right to recover would be under the federal Employers' Liability Act, and also to her rights against the automobile driver.

C. W. Walters testified:

"I am employed by the London Guarantee & Accident Company, Limited, and have been nearly five years. I investigated and handled the case of C. A. Bach, deceased. We received the notice from the Interurban Railway Company in the regular form to the effect that the accident to C. A. Bach had occurred, and I took the matter up and talked with Mr. Finch, the claim agent for the Interurban Railway Company. I then learned how Mr. Bach was killed. I then went to see Mrs. Bach in regard to compensation, and I drew up a memorandum of settlement and filed it with the commissioner, and payments of compensation were made until we got a letter from the London Guarantee & Accident Company, Limited, inquiring as to the interstate commerce phase of the case. I then made an investigation into the question of whether or not at the time of the accient the employer and employee were engaged in interstate commerce. I found that they were, and then compensation payments were stopped for the reason that the interstate commerce law covered the case."

Chandler Woodbridge testified:

"I am, and for years last past have been, a representative of the London Guarantee & Accident Company, Limited, with headquarters in Des Moines. I have general charge of the business in Des Moines and vicinity. I wrote the letter dated July 3, 1916, and sent the same to plaintiff. The letter bears my signature."

The trial court ruled that the case involves only the right of plaintiff to have established and confirmed by this court the settlement made by plaintiff and defendant company under the Workmen's Compensation Act of the state of Iowa, which settlement was approved by the Industrial Commissioner of Iowa, and which is submitted herewith for the approval of this court: that, after carefully examining and considering all of the objections and reasons urged by the defendant why said settlement should not be approved, the court is unable to see any legal reason for withholding approval of said settlement. The decree for plaintiff was therefore entered. Several propositions are urged by either side. We do not understand appellant to dispute appellee's proposition that the injury arose out of and in the course of the employment, but says that deceased was engaged, as to a part of his duties, in the regular course of his employment in interstate commerce. Appellants' propositions are that deceased was engaged in interstate commerce, and that, this being so, the federal Employers' Liability Act governed the liability of the employer or his representatives to the exclusion of any and all laws enacted by the state Legislature, and that there was no binding settlement, and that the memorandum agreement of settlement for compensation should be set aside for mistake. Appellee's propositions, in addition to the one already stated, are that under the record it does not appear that defendant, the employer, and the deceased, were both engaged in interstate commerce at the time deceased was injured; that defendant, having voluntarily entered into and partly performed a fair contract of its own making, is now estopped to repudiate the same; that defendant employer s not entitled to have the memorandum of settlement nullified or set aside on the ground of mistake, and that this court is without jurisdiction to entertain the appeal or to interfere with the proceedings had in the district court, and that, under Code Supplement, § 2477m33 (as it existed at the time of the

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trial), it is mandatory upon the district court to enter a decree in accordance with and to effectuate the memorandum of settlement, and that what the statute declares the district court must do there can be no error in doing. This is all the argument by appellee on this last point. Appellant argues as to this that, under the Constitution and the statutes, the Supreme Court has appellate jurisdiction over all judgments and decisions of courts of record, except as otherwise provided, but neither side argues as to the scope of the hearing in the district court, as in Griffith v. Cole Bros., 165 N. W. 577, L. R. A. 1918F, 923, which case was decided a few days before the instant case was submitted, and is not cited. In our view of the case, it is unnecessary to determine all these questions, for if, defendant and deceased concededly being under the Iowa Compensation Act, plaintiff and defendant, proceeding thereunder, complied with all the provisions thereof, voluntarily entering into a written settlement, signed by them, and which was filed and approved by the commissioner, it is binding and should stand unless it should be set aside for some mistake within the meaning of the law and as alleged; then a determination of these two propositions would determine the case. We say defendant and deceased were concededly under the Iowa Compensation Law, because, as we understand the record, defendant had elected to come under its provisions, and deceased had not elected to not come thereunder. Defendant admits that it had insured its liability as required by said law, and admits in its answer and in the agreed statement of facts that it was under said law so far as said law was applicable.

[1] 1. Taking up the question as to whether there was a settlement: It seems to us that this is hardly a debatable question. We think there was a settlement. It is argued by appellant at one place in their argument that in the so-called memorandum of settlement the parties were not attempting or pretending to settle anything, but only to follow the provisions and requirements of the Iowa Compensation Law, supposing themselves subject to that law, and as they were not attempting, intending to settle, to execute a release, or contract of settlement, there was no settlement. In another part of their argument they say that at the time the memorandum of settlement was signed all that was in the minds of the parties was the payment of compensation as provided in the Iowa act and the making out and filing of papers provided by that act, and the memorandum is of no more force than though the Iowa act simply provided for the payment without the making and filing of the memorandum agreement as to the compensation payable. It is true that the question as to the parties being engaged in interstate commerce is not mentioned in the memorandum of settlement, and it is said that that fact was unknown to the insurance company at that time. We cannot agree with counsel that the parties were not attempting or intending to settle anything. It occurs to us that they were attempting to, and did settle everything in so far as it affects the compensation the plaintiff was to receive because of the death of her husband. The earnings and wages of deceased were fixed and agreed upon as a basis for such compensation, and the amount of compensation and the length of time for which it should be paid was agreed upon. The agent for the insurance company went to the plaintiff for that purpose. An agreement was reached, reduced to writing, and signed. It is called a settlement all through the record. It was all voluntarily done. All that was done and done under the Iowa statute, the provisions of which were all complied with. The contract was carried out and performed for a time. It may be true that the Iowa law itself, without the settlement, or the memorandum of settlement alone, without the law, and without the approval of the commissioner, would not constitute a settlement, but we think the settlement as agreed upon and signed, and the law being complied with, gives the memorandum settlement the force of a contract. Appellant argues that because the interstate commerce question and liability thereunder, if any, was not included in the settlement in question, and was not

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referred to, that question was not settled, but it is not claimed that plaintiff would be entitled to compensation under both the federal law and the Iowa law. The only question that could be settled, even under the federal law, would be the liability of defendant, if any. Counsel cite Iowa cases to the effect that, where a claim was settled, but a counterclaim was not intended to be settled, a settlement of the first would be no bar to recovery on the latter, and where there was a settlement of a specific claim, and not of the claim in controversy, unknown to the party until later, there would be no settlement of an unknown claim. We think the cases are not in point. The only claim suggested in the instant case is that the parties were governed by the federal law. They were not attempting to settle that, of course, but, as said, they were attempting to settle the amount of compensation plaintiff should receive because of the death of her husband. Appellant cites Lemieux v. Insurance Co., 223 Mass. 346, 111 N. E. 782, where the agreement was for compensation for 25 weeks for the loss of three fingers, which was approved by the commissioner, and later the employee applied for additional compensation on account of permanent disabilitty of a hand, and the memorandum or agreement did not state it was intended to cover the claims for additional compensation, and it was held that the agreement would not bar any action of the board based upon conditions which are not covered in the agreement. But we think the situation there is not analogous. In that case it was held under the statute there was nothing which requires an injured employee to state, at the peril of loss of compensation, anything more than "the time, place, cause and nature of the injury." The Massachusetts statute further provides for additional compensation. The substance of the holding there was that, because of the form of the applications, the employee was not precluded from claiming additional compensation.

[2-4] 2. Appellant cites a number of cases to the point that mistake of fact is one of the fundamental grounds of equitable relief, and that, if an agreement is entered into by mutual mistake between two parties as to their relative and respective rights, either is entitled to have it set aside, and, further, that where there is a material mutual mistake made by the parties in respect to the subject-matter of a contract the result is that in contemplation of law there is no contract, because the minds of the parties do not meet. We do not understand appellee to dispute this general doctrine. Appellant cites Carpenter v. Detroit Forging Co., 191 Mich. 45, 157 N. W. 374, Platt v. Cement Co., 169 Iowa, 336, 151 N. W. 403, and Reddington v. Raftery, 168 Iowa, 34, 149 N. W. 933, to the proposition that a memorandum agreement of settlement for compensation will be set aside for fraud, mistake of law, or fact. The Carpenter Case arose under the Michigan compensation statute (Pub. Acts [Ex. Sess] 1912, No. 10). It appeared that the employee made a settlement for compensation with the adjuster of the employer's insurer on the understanding that, if the employee's injured hand got worse, so that he lost its usefulness, the Accident Board would see that he received additional compensation. It was conceded that such an agreement as the statute contemplates may be set aside for fraud, mistake, or undue influence, but the court held that the statute contemplates an agreement and settlement made without contingency or condition, and not one based upon a possible or probable event that may render it inoperative, and that an agreement and settlement based on the strength of such a condition or contingency is not such as the statute contemplates. As we have said, the settlement in that case was based upon the understanding before set out, and the evidence of the employee and his wife went farther, and was to the effect that, if the hand and fingers did not get better, he could put the matter before the board, and that the agreement would not be binding or final. The court said:

"It does not meet the question to say that Mr. Pocklington [the adjuster] did not intend to act fraudulently. The material question is: What was the effect of what he said? Ordinarily one cannot success-

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fully ask for affirmative relief on the bare ground that he was either ignorant of the law or mistaken as to what it prescribed. But it is now well settled that this rule is not invariably to be applied. In many cases where injustice would be done by its enforcement this has been avoided by declaring that a mistake as to the existence of certain particular rights, though caused by an erroneous idea as to the legal effect of an instrument, or as to the duties or obligations created by an agreement, was really a mistake of fact, and not strictly one of law, and so did not constitute an insuperable bar to relief. * * * The rule is that a release may be rescinded for a mutual mistake of law. * * * Whether placed upon the ground of constructive fraud or mistake of fact as well as of law, the law forbids that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the doctrine that a mere mistake of law affords no ground for relief. We think that, placing its action upon either ground, the board did not err in acting, notwithstanding the so-called settlement agreement."

The facts in the instant case fall far short of bringing it within the rule there announced. There is nothing here indicating that plaintiff, with knowledge of the ignorance of the defendant as to whether compensation should be made under the federal statute, or that she encouraged that ignorance, or that she knowingly deceived defendant and led it into a mistaken conception of its legal rights. The Platt Case, supra, was not a compensation case. It was a case where it was claimed that an entire claim was settled. The plaintiff claimed that he signed the paper without knowing that it was anything other than a receipt, simply for wages, and there was evidence that defendant's agent misrepresented the character of the paper which he induced plaintiff to sign, and it was held that these were questions for a jury. The Reddington Case is there cited, and is of a similar import. Counsel for appellant assume that the facts of the instant case show that deceased was engaged in interstate commerce. This is disputed by appellee. Appellant relies on the case of Ross v. Sheldon, 176 Iowa, 618, 154 N. W. 499, and later cases. They claim that under the rule of that case the deceased and defendant in this case were engaged in interstate commerce. It may be noted that the Ross Case was decided and later published a very short time before Mr. Walters received the letter from the insurance company inquiring as to the interstate commerce phase of the case, when notice of refusal to make further payments was given to plaintiff and the commissioner. It is possible that the Ross Case was noticed, and that the insurance company then conceived the notion that this settlement should have been made under the federal statute. However this may be, we think a mere misconception on the part of the insurer as to whether the insurance company should have proceeded under the state law or the federal law, or their not knowing the law, would not of itself be such a mistake as would, under the law, authorize the setting aside of a settlement made under the state law. Especially so if the insurer, after the settlement, learned of a case which it claims required that the settlement should be made under the federal law. The defendant was not misled in any way by the plaintiff. We think this defendant should be held to know the character of its business. At any rate, there is no reason given or showing that it did not know as much about the alleged interstate commerce character of its business before the settlement in question as afterwards. Nor does it appear that all the facts coming to defendant's knowledge after the settlement, could not by the same investigation have been learned before.

[5, 6] Appellee contends that under the record there was no "mistake," as that term is employed in equity jurisprudence. It is pointed out by her counsel that defendant at no time labored under a mistake, and that the so-called mistake was on the part of the insurer or of its agent, Mr.

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Woodbridge, personally, as he states in his letter to the commissioner. It should be said that the insurance company was the agent of defendant. Counsel for appellee point out, too, that the insurance company is not a party to the cause, and though it, and not the defendant, is to pay the compensation, the insurance company is not complaining of the settlement. They say that there was no mistake or misinformation, even on the part of the representative of the insurer of defendant; that both Mr. Woodbridge and Mr. Walters overlooked, and did not think of, the interstate commerce theory for some time after the settlement, and until they had received a letter of inquiry from the insurance company, and then they made the investigation. It is not alleged or claimed by defendant that there was any mutuality of mistake. The mistake must have been mutual in order that relief may be granted, where, as in this case, there is no fraud on the part of the opposite party. Exchange Bank v. Schultz, 167 Iowa, 136, 138, 149 N. W. 99; Wilson v. Wyoming Cattle Co., 129 Iowa, 16, 105 N. W. 338. It is contended by appellee that the defendant does not allege in the answer wherein there was a mistake, nor state under what mistake and misinformation it labored, and that the general allegation that its act in settling with plaintiff was done under mistake and misinformation, will not entitle it to set aside the contract entered into by the parties and approved by the commissioner. On this they cite Hughey v. Smith, 65 Or. 323, 133 Pac. 68; 9 Corpus Juris, 1232, and note. But, passing that, we think there was no mistake in the sense contended for by appellant, and calling for equitable relief. The defendant, the employer, was not mistaken either as to law or fact, and the insurer's representative, to say the most, seems merely to have overlooked, or been unmindful of, the interstate commerce theory, a mistake on the part of the agent of the insurer personally. We said in Marshall v. Westrope, 98 Iowa, 324–331, 67 N. W. 257, 259, and Milking Machine Co. v. Galloway, 168 Iowa, 560, 150 N. W. 713:

"The doctrine is settled, that, in general, a mistake of law, pure and simple, is not adequate ground for relief. * * * The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief."

In 2 Pomeory's Equity (3d Ed.) § 842, we find this doctrine:

"Where a party, with knowledge of all the material facts and without any other special circumstances, giving rights to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not, in general, relieve him from the consequences of his mistake."

The reasons for the rule are given, and the author states that the most important, perhaps, is the assumption that all persons of sound and mature mind are presumed to know the law. The author continues in the same section:

"If ignorance of the law were generally allowed to be pleaded, there would be no security in legal rights, no certainty in judicial investigations, no finality in litigations."

[7] So it is in the instant case. The parties proceeded under the state Compensation Law, and made their agreement, which was approved by the commissioner. The proceedings were commenced on the defendant's initiative. It was all voluntarily done and without fraud. Later the same defendant, conceiving the law to be different from what it supposed when the first proceedings were had, now comes in and says that the proceedings should have been under the federal law, and asks to have everything set aside. Finally, it is contended by appellee that equitable relief may not be granted defendant because of its lack of diligence, and they cite 2 Pome-

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roy's Equity (3d Ed.) § 839; Steinmeyer v. Schroeppel, 226 Ill. 9, 8 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224, and other cases. Under the circumstances, we think defendant may not now litigate the question as to whether defendant and deceased were engaged in interstate commerce. We think plaintiff's plea of estoppel is good. The question as to whether the defendant and deceased were engaged in interstate commerce and other questions argued are not passed upon, because, as before stated, we think the two questions discussed are controlling. We are of opinion that the decree of the district court was right, and ought to be, and it is, affirmed.

Ladd, C. J., and Evans, Gaynor, and Stevens, JJ., concur.

SUPREME COURT OF IOWA.

ELKS

v.

CONN. (No. 32215.)*

1. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—INSTRUCTION—FAILURE OF EMPLOYER TO COMPLY BY INSURING.

In Code Supp. 1913, § 2477m41, requiring employers subject to provisions of the Compensation Act to comply therewith by taking out liability insurance, and that if the employer neglects to comply shall be liable "under part one of this act," the quoted words must be construed to mean that an employer failing to comply with the insurance provision is not under the Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PURPOSE.

The Workmen's Compensation Law is intended for the benefit of the workman and should be construed so as to carry out that intent.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

7. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT— FAILURE OF EMPLOYER TO INSURE—EFFECT.

Where an employer, presumed under Code Supp. 1913, § 2477m, to have accepted the Workmen's Compensation Act, failed to comply with the provisions of Code, §§ 2477m41, 2477m49, requiring him to take out insurance to protect himself against loss, while such failure deprived employer of the benefits of the act, it could not deprive the injured employee of an action at law.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Appeal from District Court, Humboldt County; D. F. Coyle, Judge.

Action at law to recover damages growing out of personal injuries sustained by plaintiff while in the employ of defendant, while in the con-

*Decision rendered, May 14, 1919. 172 N. W. Rep. 173.

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struction of a drainage ditch. There was a trial to a jury, resulting in a verdict for plaintiff for $4,500. After the verdict and before judgment, the trial court sustained defendant's motion in arrest of judgment, and rendered judgment against plaintiff for costs. The plaintiff appeals. Reversed and remanded.

Kenyon, Kelleher, Price & Hanson, of Ft. Dodge, for appellant.

PRESTON, J. The petition, filed May 29, 1916, alleged the relationship of employer and employee between plaintiff and defendant, at the time plaintiff was injured, February 11, 1916, and charged defendant with negligence in furnishing plaintiff fuse, used by plaintiff in blasting, which fuse was inferior, old, and defective; that plaintiff was free from contributory negligence; that as a result of the explosion both of plaintiff's eyes were blown out and his sight destroyed, his face wounded and disfigured, his leg broken, and other injuries. It was further alleged that defendant failed to comply with the provisions of chapter 8a of the Supplement to the Code of Iowa, in respect to Employers' Liability and Workmen's Compensation, and failed and neglected to insure his liability, as by section 2477m41 is required, and that thereby the said defendant rejected the provisions of said act. The answer denies any negligence, and specifically denied that he rejected the terms and provisions of the Compensation Act; says that he never served, or caused to be served, on any person, or posted any notice with any view or intention of rejecting the terms thereof; that he never did any act to indicate that he intended to reject the terms thereof. It also pleaded that the injury of plaintiff was due to contributory negligence of plaintiff, and that plaintiff assumed the risk. At the close of the evidence the court submitted the questions of fact raised by the issues to the jury. No exceptions were taken to the instructions by either party. The court also submitted special interrogatories. The jury found that plaintiff was in the employ of defendant, and that defendant was guilty of negligence, and by a general verdict assessed damages in the sum of $4,500. The motion in arrest, so far as it is now material, is as follows:

"(2) Because the petition of the plaintiff fails to state a cause of action against the defendant which is recognized in a court of law, in this, that it fails to show or state what acts or omissions of the defendant worked a rejection of the Workmen's Compensation Act, and states only that the defendant rejected the terms of the said act by reason of not taking out workmen's compensation insurance, which act is not a rejection of the act."

[1] It was agreed by counsel for both sides that the court should specify the ground and reasons for the ruling on said motion, in order that the sole question presented might be specificially set forth, and in order that, should this court reverse the lower court's decision, it might be directed by this court to enter judgment upon the verdict without a further hearing or trial of the cause. The court's ruling was based solely upon the ground that the failure of defendant, Conn, to take out insurance, as provided by the Workmen's Compensation Law (Code Supp. 1913, §§ 2477m to 2477m51), does not have the same force and effect as the rejection of the said law by the said Conn, and that the failure of Conn to take out such insurance does not take this case out of the workmen's compensation statute, but that the liability of defendant is under the Workmen's Compensation Law. So that the one question presented is as to the effect of the failure of defendant to comply with the provisions of sections 2477m41, and 2477m49. It is admitted in the record that defendant did not comply with the two sections before named, and that no such insurance was taken out, and that he was not relieved by the insurance department and industrial commissioner from the taking out of such

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insurance under the provisions of the last-named section. Code, § 2477m, 1913 Supp., provides substantially, without quoting the entire statute, that, except as by this act otherwise provided, it shall be conclusively presumed that every employer, as defined by this act, has elected to provide, secure, and pay compensation, according to the terms, conditions, and provisions of this act, for any and all personal injuries sustained by an employee, arising out of and in the course of the employment, and in such cases the employer shall be relieved from other liability and levy of damages, or other compensation for such personal injury. Then follows the provision that an employer electing to reject the terms is deprived of certain defenses, and that negligence is presumed, and further provides:

"Every such employer shall be conclusively presumed to have elected to provide, secure and pay compensation to employees for injuries sustained arising out of and in the course of the employment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employees by posting the same in some conspicuous place at the place where the business is carried on," etc.

Section 2477m41, 1913 Supp., provides:

"Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one of this act."

The Thirty-Seventh General Assembly, after plaintiff was injured, and after the bringing of this suit, by section 20, chapter 270, amended the last-named section by striking out the words, "part one of this act" at the end of the section, and inserted the following:

"The common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensation provisions of chapter 8a, title XII, Supplement to the Code, 1913."

It is appellant's contention that the language, "part one of this act" creates an ambiguity, and a doubtful meaning, when applied to the facts of the case at bar, which require a judicial construction of this act, and that said words should, by judicial construction, be stricken therefrom, and that in lieu thereof there should be inserted the language before set out, in the amendment by the Thirty-Seventh General Assembly. The question in regard to the ambiguity in the statute was suggested in Sylcord v. Horn, 179 Iowa, 936–940, 162 N. W. 249, but was not determined. In Paucher v. Enterprise Coal Mining Co., 164 N. W. 1035–1037, the question arose as to the construction of the words now under consideration. In that case the defendant had not taken out insurance, and the trial court held that under the entire act, construed together, it requires the employer to take out this insurance, or be subject to the liabilities of one having rejected the act. Because of other controlling questions in that case, the point was not determined, but we did say that we were inclined to the view of the district court. The question is now presented for determination, and we are of opinion that the words referred to should be construed to mean that one failing to comply with the insurance provision is not under the provisions of the Compensation Act, though it may not be necessary to put it in the exact language contended for by appellant, and as used in the act, passed by the Thirty-Seventh General Assembly. Such is the substantial effect of it. The Legislature having amended the law renders the determination of the point of little value as a precedent for cases arising after the passage of the amended statute.

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[2-4] I. Statutes are, as a rule, given a prospective application, unless a contrary intention appears, and, conceding that the intention of one Legislature is not binding upon another, and that the act of the Thirty-Seveth General Assembly is not binding upon the courts in interpreting the words under consideration, still, the fact that the Thirty-Seventh General Assembly did, in effect, give the words in question the interpretation contended for by appellant is a circumstance properly to be considered by us. As bearing somewhat upon this proposition, see 36 Cyc. 1142. The act of the Thirty-Seventh General Assembly does not, by the language used, purport to give a construction to the act of which it is amendatory, but it is apparent that it was the purpose and intention of that Legislature to remove the ambiguity of the former act. We said in Slutts v. Dana, 138 Iowa, 244-250, 115 N. W. 1115, 1118:

"While a legislative construction of an act is entitled to due consideration from the courts, it is by no means binding; and whenever it appears that the so-called construing act may have been passed simply for the purpose of removing doubt from previous acts the courts should so consider it. And such was, in our judgment, the purpose of the chapter."

Code, § 3446, provides:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects, and assist the parties in obtaining justice."

It must, of course, be conceded that there is an ambiguity in regard to the words and statutes heretofore referred to. This being so, it is the duty of the courts to give effect to the language used, and all parts of the statute, whenever it can be consistently done, and to so construe the statute as to give it force and effect, and in such a manner as to best accomplish the evident intent of the Legislature. To do this we resort to certain established rules of construction.

[5] This intent is to be determined by means of the rules of interpretation, and not alone from the abstract and permissible definition of the terms used. The statute should be construed with reference to its general purpose, and aim, and this involves the consideration of its subject-matter, the change in, or addition to, the law. It is proper to take into consideration the law as it was before the mischief sought to be remedied, and the nature and the reason of the remedy. The several sections of an act are to be construed as parts of a connected whole, and harmonized, if possible. Appellant cites authority to these propositions that if the intention of the Legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law; that the reason of the law will prevail over its letter, especially where the literal meaning would work an injustice; words may be accordingly rejected and others substituted; that every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity for its enactment, the difficulties or evils in the former law, the remedy provided by the new one, and the statute ought to be given that construction which is best calculated to advance its object and suppress the mischief and secure the benefits intended. 36 Cyc. 1108, 1109, 1110.

[6] Section 2477m2 of the Compensation Act is "that the rights and remedies provided in this act for an employee on account of injury shall be exclusive of all other rights and remedies of such employees; * * * and all employees affected by this act shall be conclusively presumed to have elected to take compensation in accordance" therewith, etc. Appellant contends that if an employer has taken all the steps required by the act to adopt the compensation principle, the only remedy of an employee who has also come under the act, as against the employer, is to take compensation, and employers are brought under the act by presumption that if

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they do nothing they are presumed to have adopted the compensation provision of the statute. But that before employers can defeat the right of a workman to elect, after the accident, to sue for common-law damages, without the common-law defenses being available to the employer, the employer must go a step further; he must either insure against his liability for compensation under section 2477m41, or comply with section 2477m49, in furnishing proof to the insurance department which is satisfactory to both the insurance department and the Iowa industrial commissioner of the employer's solvency and financial ability to pay the compensation benefits provided by the act, citing 1 Bradbury's Workmen's Compensation, 311. If the ruling of the trial court was right, it would be proper to consider the situation in which plaintiff or an employee would find himself. If he would be placed in a worse situation by the enactment of the compensation law than he was before, it would be a matter properly to be taken into consideration in determining whether the interpretation given the law by the trial court is a reasonable one, and whether such was the intention of the Legislature. The compensation law is for the benefit of the workman. Mitchell v. Phillips Mining Co., 181 Iowa, 600-607, 165 N. W. 108.

In the instant case it was found by the jury that the employer, Conn, was guilty of negligence in furnishing plaintiff defective fuse. As a result plaintiff was severely injured. Prior to the enactment of the compensation law he could have sued defendant at common law and recovered judgment, and collected his damages, if defendant had been financially responsible. But assuming, for the purpose of the case, that after the commencement of the suit, defendant had disposed of his property, or become insolvent, the provision of the statute that he be required to take out insurance to guarantee the payment of such sums as should be awarded him under the compensation act was not complied with, nor was he relieved from taking out such insurance by the commissioner, under section 2477m49. In such a situation defendant was in the position, at the commencement of the action, to say to the court, if the action were at common law, that, notwithstanding his failure to comply with the provisions with reference to insurance, he was still operating under the compensation law, and that plaintiff could not maintain an action at common law against him, because, by the terms of part 1 of the law both were conclusively presumed to be operating under that statute. Defendant was also in the position to say, if proceedings were brought against him under the compensation law, that because he had failed to comply with the provisions of sections 2477m41 and 2477m49 plaintiff was therefore not entitled to receive the benefits of the compensation law, that a failure to comply with the conditions in the two last-named sections removed defendant from the operation of the statute, that his failure to comply with said conditions operated the same as though he had expressly rejected the law under the provisions of part 1 thereof, and that for that reason plaintiff could not proceed against him under the Workmen's Compensation Act. Under such circumstances, the interpretation given to the act by the trial court, the enactment of the compensation law, instead of effecting justice, would operate to the disadvantage of the plaintiff, and deprive him of any effectual remedy for his injuries. Such a state of affairs as given in the illustration is not improbable.

[7] We think it could not have been the intent of the Legislature to enact a law which was intended for the benefit of the employee and society in general, which would place an employee in such a situation. In the case of Bayon v. Beckley, 89 oCnn. 154, 93 Atl. 139, 8 Neg. & Com. Cases, 588 while the language of the Connecticut statute is not identical with our own yet the essential features are quite the same. In that case it was held that both parties had accepted the compensation law, because neither party had expressly rejected it or withdrawn from it. The plaintiff was injured while in the course of his employment, and it was then

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discovered that the defendant had failed to comply with the provisions of section 30 of part B of the act. That section reads as follows:

"Every employer subject to part B who shall not furnish to the commissioner satisfactory proof of his solvency and financial ability to pay directly to injured employees or other beneficiaries the compensation provided by this act, shall insure his full liability under part B."

Section 42 of the Connecticut act reads:

"Any employer who has accepted part B of this act and who thereafter fails to conform to any of the provisions of section 30 of part B, shall thereby forfeit all benefits thereunder and shall be liable as if he had not accepted the same."

If the provisions of the Iowa statute (section 2477m41) had been worded the same as section 42 of the Connecticut act just quoted, there could be little doubt that the failure on the part of Conn either to insure or to be relieved thereby upon a showing to the commissioner would have operated the same as though he had not presumably accepted the act.

In the Bayon Case, the defendant claimed that defendant was therefore properly presumed to have accepted part B because neither he nor the plaintiff had refused to accept it, and that he thereby incurred no liability to compensate the plaintiff for any injury under part B, for the reason that he failed to comply with the provisions of section 30, and that, if liable to her at all for her injuries, it is only in an action at law. The court said:

"These claims present two questions of law for our decision: * * * Second, * * * does a failure to comply with the provisions of section 30 of part B deprive not only them, but also their employees, of the benefits of its provisions."

Discussing the second question in the case, which is similar to that before us, the court said:

"The chief benefit accruing to an employer from his acceptance of part B is that he is thereby relieved from liability to any action for damages on account of personal injuries to his employees. If he had not accepted part B, he would be liable for such injuries according to the rule of the common law as modified by part A. When, therefore, section 42 provides that he shall forfeit all benefits under part B and be liable as if he had not accepted the same, the literal meaning of the language is that his failure to comply with the provisions of section 30 deprives him of the right to exemption from liability at common law for injuries to his employees arising out of their employment, and renders him liable to such actions as modified by part A. This is his situation when he refuses to accept part B, or, having accepted it, withdraws his acceptance. It is also the situation when the employee refuses to accept part B, or, having accepted, withdraws his acceptance; for the employer in such case, although he still adheres to his acceptance of part B, is relegated to his common-law rights" as modified by part A. "The effect of section 42 clearly is to render the employer who does not comply with section 30 liable as he would be had he not accepted part B; but it does not follow that he is also relieved from liability under part B to compensate his employee for injuries for which the latter could not recover at common law. While providing that the employer's noncompliance with section 30 results in a forfeiture of all his benefits under part B, section 42 does not, in terms, say that the employee loses all his rights and benefits under part B. Nothing is said as to its effect upon the employee; but, by making the employer liable as if he had not accepted the act, it necessarily restores to the employee his common-law right of action, as modified by part A, against the employer. This is the clear implication from the language. If part B gave compensation only for personal injuries for which a common-law action would lie, it would be entirely clear that the intention was

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by section 42 to make neglect to comply with section 30 relegate both parties to their common-law rights. But the chief inducement to the employee to accept part B unquestionably is the fact that he thereby secures compensation for injuries for which the common law gives him no remedy. It is too unreasonable to believe that the Legislature intended that the employer, after having accepted part B, should be able to deprive the employee of these benefits, without notice, by simply neglecting to comply with the provisions of the act which he had accepted. It is consistent with the language of section 42 to hold that failure by the employer to comply with section 30 deprives the employer of his benefits under part B, but does not deprive the employee of his benefits under it, and that the latter, in such case, may claim compensation under the act, or, in a case in which the common law gives a remedy, may have his action at common law, as modified by part A."

The construction given by the trial court it seems to us nullifies sections 2477m41 and 2477m49. An employer by doing nothing would be presumed to have accepted the act. After having accepted the act by presumption, if he failed to comply with the requirements of the first of the two sections just referred to, no consequences would follow and no rights be forfeited, and thus these sections would be of no force. Under the construction contended for by appellant, if the employer, by presumption, accepted the act, then he would be compelled to comply with all the provisions of the act, including the taking out of insurance to protect his losses, and a failure on his part to obey the law, with reference to insurance, would deprive him of the benefits of the act.

For the reasons given, we think the trial court was in error in sustaining the motion in arrest of judgment. The cause is reversed and remanded, with directions to overrule the motion and enter judgment against the defendant for the amount of the verdict, and as of the date when the verdict was returned. Reversed and remanded.

Ladd, C. J., and Weaver, Gaynor, and Salinger, JJ., concur.

SUPREME COURT OF IOWA.

PIERCE

v.

BEKINS VAN & STORAGE CO. (No. 31946.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS—REVIEW.

Whether there was willful misconduct of employee committed with intent to injure himself, or whether his intoxication was proximate cause of his injury, are fact questions for the tribunals provided for by the Workmen's Compensation Act, and, where reasonable minds may draw differing conclusions on the evidence, the Supreme Court will not interfere with their findings.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

*Decision rendered, May 6, 1919. 172 N. W. Rep. 191.

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2. MASTER AND SERVANT—COMPENSATION ACTS—CONSTRUCTION.

The Workmen's Compensation Act is highly remedial and is to be construed as such statutes are.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The Supreme Court is not precluded from finding that the Workmen's Compensation Act covers injury sustained in another state, because the act does not in terms declare that it shall have such effect.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTRATERRITORIAL EFFECT.

The Iowa Workmen's Compensation Act being elective a hiring thereunder is in effect a contract of employment into which the act is to be read, and one employed in Iowa, but injured in Nebraska while driving a van in line with his employment, would be entitled to recover according to the terms of the act, under Code Supp. 1913, §§ 2477m2a, 2477m2b, 2477m6, 2477m7, 2477m8, 2477m11, 2477m14, 2477m19, 1477m21, 2477m29, 2477m33.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—READING INTO CONTRACT.

Where the Workmen's Compensation Act is elective as to both employer and employee, payment of compensation is not the performance of a statutory duty, but of conditions in the contract of hiring, which conditions are in the contract by means of reading the act into it.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

Appeal from District Court, Woodbury County; George Jepson, Judge.

Appeal from an action of the district court effectuating an award against appellant by a board of arbitration sustained on review by the industrial commissioner. Affirmed.

Sargent, Strong & Struble, of Sioux City, for appellant.
George Kephart and Kass Bros., all of Sioux City, for appellee.

SALINGER, J. [1] I. The first contention of the appellant is that the accident which caused the death awarded for was occasioned by the willful misconduct of the employee, committed with intention to injure himself. The second complaint is that at the time of the injury the employee was intoxicated, and that said intoxication was the proximate cause of his injury.

It is to be doubted whether there is any evidence of willful misconduct, or of such conduct with intent to inflict the injury. Be that as it may, it is perfectly clear that whether there was such misconduct, or such misconduct with such intent, is fairly a question of fact, and that on the evidence reasonable minds may differ as to whether or not there was such misconduct. The same situation exists as to the claim that there was intoxication which was the proximate cause of the injury. One of the vital purposes of the Compensation Act (Code Supp. 1913, §§ 2477m–2477m50) is to minimize litigation and expensive contests. In aid of this purpose, the decision of the statute tribunals on some things is made final. All findings of fact upon conflicting evidence, or upon evidence from

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which reasonable men may draw differing conclusions, are within that class. We agree with appellant that our decision at this point should not be controlled by Fischer v. Priebe, 178 Iowa, 512, 160 N. W. 48, and we have held in Griffith v. Cole, 165 N. W. 577, L. R. A. 1918F, 923, that the limitations placed by the Priebe Case on the power of the district court are expressed in a dictum. None the less, the effect of the Griffith Case is that we cannot review a finding of fact unless the transcript makes it appear as matter of law that such finding is not sustained by or is contrary to the evidence, and say in that connection that "the court may not go into a general fact controversy." We therefore hold that we may not interfere with the finding of the statute tribunals that there was no willful misconduct, no intention to inflict the injury, and that there was no intoxication which was the proximate cause of the injury. See Cushman v. Doherty, Industrial Accident Board of Massachusetts, June 17, 1915; Miller v. Foreman, Maryland Industrial Accident Commission, June 2, 1915; Hansen v. Door Co., Industrial Board of Illinois, May 19, 1914.

We find nothing that is either held or cited with approval in Hunter v. Coal Co., 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803, inconsistent with our pronouncement at this point.

II. The appellant was in business in Sioux City, Iowa. It there employed one Pierce. In line with the employment it directed Pierce to drive a moving van from Sioux City to the town of Homer, in Nebraska, for the purpose of conveying to Sioux City a lot of household goods. Pierce was injured while so employed, and in Nebraska. Appellant presents that the Workmen's Compensation Act of the state has no application where the injury occurs outside of the state of Iowa.

It is claimed that, in jurisdiction wherein it has been held that their act has no extraterritorial effect, the statute construed indicates an intent to limit itself to the state not more strongly than does the Iowa act; that provisions in our own statute for which it is claimed they show an intention to give no extraterritorial force are not found in statutes that have been construed to have extraterritorial force; and that the cases urged by appellee are not applicable because of the nature of the statute which these cases construe. Each party here contends the authorities relied on by the other are inapplicable because of differences between our act and the statutes which these authorities construe. Both agree that the authorities are in decided conflict. We conclude that resort to the decisions in other jurisdictions would be of very doubtful value in interpreting the Iowa act, and we shall refrain from so resorting. It is fortunate that there is no disagreement on the proposition that the state can give a compensation act extraterritorial effect. The ultimate question then is this: On application of approved canons of construction, should it be found that there was an intention to limit the effect of the act to the state, or found that it was the intention that it shall be applicable where the contract of hiring is made in the state and the employee is injured while in the course and because of his employment, no matter where the injury occurs?

[2] The statute is highly remedial, and is to be construed as such statutes are. However the cases may differ, there is no difference as to the rule that such statutes as this shall have a broad and liberal construction in aid of accomplishing the object of the enactment. See Kennerson v. Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436. The title to the act indicates the breadth and scope of the act. It has a declaration that it relates to the liability of the employer for personal injuries sustained "in line of duty." That it was not intended to limit recovery under the act to injuries sustained while the employee was in the state is to be found by an application of the reasoning upon which the rule, "Designatio unius est exclusio alterius," rests.

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[3, 4] Section 2477m, subsec. d, Code Supplement 1913, provides that every employer shall be conclusively presumed to have provided compensation according to the act "for injuries sustained arising out of and in the course of the employment." Section 2477m2a is to like effect. Section 2477m, Code Supplement 1913, that, unless the act otherwise provides, the employer has elected to pay compensation according to the act "for any and all personal injuries arising out of and in the course of the employment." Where stated things are enumerated, things not named are excluded. On the same reasoning, where a statute declares that compensation under its terms is to be made for any and all injuries sustained without limitation beyond that they shall occur in the course of and arise out of the employment, it is the declared intention that compensation shall be made under the statute if the injury be of the class named in the statute--the only limitation is the relation of the injury to the duty. No exception based on the place where the injury occurs is found in the language, and if it is to be ingrafted upon that language it must be done by judicial legislation. It is no answer to say that it would have been wiser to have made the place of the injury a condition to recovery under the act. Had the Legislature thought that desirable, it would have been easy to add, to the words allowing a recovery for any and all injuries some such words as "except where the injury is sustained elsewhere than in the state." No matter how wise and beneficial such an addition may be assumed to be the Legislature saw fit not to make it. We have not the power to rewrite the statute to supply what, for the sake of the argument, should have been enacted, but was not.

So far, we have assumed that such an exception as the act does not contain would be beneficial. Whether it would be that is quite debatable. For one thing, it would make impossible the accomplishment of the one purpose of such acts, to wit, to bring about speedy payment by procedure at once simple and inexpensive. It would further tend to nullify another thing intended, to wit, that the employer shall be enabled to charge to the industry what injury to the employee engaged therein will cost. As to the first, compelling the employee to bring a common-law suit, and to apply to its decision the statutes of another state, is certainly not calculated to promote speedy payment by procedure simple and inexpensive. As to the second, the employer could fix no tax upon his business to meet expenditures for compensation because he would not pay statute compensation where the injury occurred outside of the state, and could not foretell what proportion of injuries to be compensated for would arise outside of the state. This, however, does not so much matter. Once grant the power to make the statute apply to injury sustained outside of the state, and that this has been done, and it becomes immaterial whether it would be injurious or beneficial to have limited the statute to the state.

It is provided in subsection e, § 2477m16, that the words "personal injury arising out of and in the course of the employment shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer," and also applies to those "who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business." Appellant tells us that the only way every section of the statute may be given full force and effect is by adding to a provision dealing with services performed about the premises of the employer and "elsewhere in places where their employer's business requires their performance," the limiting words, "within the state." We shall presently attempt to show that for the purposes of the present controversy it is not essential that every provision of the act shall have effect. Be that as it may, we have found no argument that satisfies us that we have the right to add such a limitation.

[5] Appellant cites cases which proceed on the reasoning that the

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courts may not construe such an act as this to have extraterritorial operation, unless authority for such construction is found in the act in "unequivocal language, or plain and unmistakable words." The case of Kennerson v. Towboat Co., 89 Conn. 67, 94 Atl. 372, L. R. A. 1916A, 436, is at least one respectable authoriy that holds to the contrary. We do not refer to it as a standard for construing the Iowa act, but for its holding upon a broad, general principle of statute construction, and we agree with the rule of that case as to such construction. We concur in the holding of the Kennerson Case that only as to cases in delicto is it required that the statute shall say in unmistakable words that it is intended to operate extraterritorially. We hold that we are not precluded from finding that our own statute covers injuries sustained in another state because the act does not, in terms, declare that the statute shall have such effect, and that we may find it has such effect because its language is broad enough to cover such injuries, and that to construe it as covering them effects the broad beneficial object of the enactment.

III. It was said in Goodling v. Ott, 77 W. Va. 487, 87 S. E. 862. L. R. A. 1916D, 637, in approval of the text in 1 Bradbury Workmen's Compensation, 44 et. seq., that when a Compensation Act is elective a hiring amounts to a contract of employment into which the statute is to be read. Appellant seeks to distinguish this decision, because under the West Virginia statute both parties contribute to the fund, and because practically every provision of our own statute claimed to indicate a purpose to limit the effect of the act to the state is not found in the West Virginia statute. Be that as it may, this does not make a distinction against the proposition that the contract of hiring under an elective compensation statute is in effect a contract of employment into which such statute is to be read. Appellant concedes that, whatever name may be given to the effect and purposes of such statutes, the law of the place where a contract is made enters into and is part of the contract. It adds, "that it is not a question of what the Legislature can do in such a case, but what it has done;" that the question remains whether the Legislature intended to restrict the statute to within the lines of the state, or to give it an extraterritorial effect. In so far as this indicates an argument that, though the parties have entered into a contract of hiring into which the statute is to be read, it remains a controlling question whether the statute itself is intended to have extraterritorial effect, we think some confusion of the thought is involved. In other words, it can be conceded that as a law the compensation statute is not to be effective in other states. But such concession will not meet the position that, even if the statute is not law in another state, yet, with the statute read into the contract, there is an enforceable contract to be paid according to the statute, though the injury be suffered outside of the state. And it will be found that, in cases wherein it is affirmed that there can be no recovery because the statute has no extraterritorial effect, the distinction was overlooked that a statute which is a law only within the state may be so read into a contract of hiring as that compensation according to the terms of the statute may be recovered, though the injury was sustained in a jurisdiction in which said statute was not effective as a law. In other cases denying recovery on the ground that the act had no force beyond the limits of the state, there was no contract between employer and employee. With the possible exception of contracts wherein it is intended that the same shall be performed wholly without the state, the courts will apply the domestic compensation law where the contract of employment was entered into within the state, on the theory that the obligation sought to be enforced is based on contract and not on toil. See Corpus Juris, Title Workmen's Compensation Acts Div. 4 Conflict of Laws, § 28.

3a Upon what does the right to recover in this case rest?

[6] Subdivision d of section 2477m, Code Supplement 1913, provides that the employer shall be conclusively presumed to have elected to pay

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compensation according to the provisions of the act, unless he give a specified notice in writing to the contrary. Section 2477m is to the same effect. Section 2477m2a, that all employees affected by the act shall be conclusively presumed, in the absence of notice to the contrary, to have elected to take compensation in accordance with the act. These satisfy us that the contract of hiring at bar is an enforceable contract, and by means of reading the statute into it is a contract to compensate for injuries sustained in and arising out of the employment, no matter where such injury is sustained. Whether the statute itself has or does not have an extraterritorial effect, the Legislature can enact that a contract of hiring made within the state shall have an extraterritorial effect in the sense that payment is due according to the terms of the contract, though the injuries be suffered in another state.

[7] Our statute is confessedly elective. We are told that no distinction in construction is to be based upon whether the act is compulsory or elective. That is true as to some provisions of compensation acts. But that the statute is elective has controlling bearing on one thing that is most highly important. Where the statute is elective as to both employer and employee, payment of compensation is not the performance of a statute duty, but the performance of conditions in the contract requiring which conditions are in the contract by means of reading the compensation statute into the contract. We agree with appellant that the state "can limit the operation of a contractual obligation just as authoritatively as it can a compulsory statute." But that, of course, is not a denial that under an elective statute payment of compensation is purely a discharge of a contract obligation. It follows, then, that it is quite unnecessary to make this case turn upon a holding that the statute itself is operative in Nebraska. It suffices if employer and employee contracted in Iowa that, if injury was sustained in Nebraska, compensation should be governed by the terms and conditions found in the Iowa statute, to which, by law, such contract makes reference. It is not the question whether the Iowa act operates in another state. Parties in Iowa may contract that, if one be injured in Nebraska in course of the employment, the method of settlement for the injury shall be a described part of the statute law of New Jersey; and, if such an injury does occur in Nebraska, settlement can be enforced in Iowa on the terms of the New Jersey statute, without a thought that the statute law of New Jersey is the law of Nebraska. We know of no reason why parties may not by contract fix standards of settlement to be any definitely contracted for method, unless there be some statutory or constitutional objection to such an agreement. The entire structure of the Iowa act, not only fails to prohibit such a contract, but by being elective creates a contractual relation under a contract providing for settlement on a standard fixed by the Iowa act. Such a contract is no more objective than one providing for a common-law arbitration. See Hunter v. Coal Co., 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803. Under such a contract, the employee could not refuse to obey if the master directed him to leave the state to perform an act in the course of the employment. If he did obey, there is no reason why the master should be allowed to repudiate that part of the contract of employment which provided how compensation should be made if the servant suffered an injury while obeying this direction. Such a contract protects both, and defines the rights of both. The master is assured of the limitations of his liability. The servant is assured of definitely fixed compensation, mutually agreed upon as adequate, and that he will receive the same promptly and without the vexation or expense of litigation.

We hold that the employee in this case has a valid contract which allows him to recover compensation according to the terms of the statute for an injury suffered in Nebraska; that the case stands precisely as if it had been expressly contracted that for an injury suffered outside of the

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state the compensation due should be determined by the terms of the Iowa statute.

IV. What are the avoidances?

Subdivision b of 2477m makes the act compulsory on both employer and employee where the employer is a municipal corporation. It is suggested that, if we give our statute such effect as the employee here claims for it, the said provision of the statute would, in a sense, work class legislation, in that a large mass of employers and employees are relegated to the provisions of a compulsory statute, while as to another large class the statute is merely elective. We are unable to see that this bears relevantly upon whether there may be a recovery for injuries suffered elsewhere than in the state. Be that as it may, if this is a good objection, its effect does not stop with destroying the enforceability of the statute as to injuries sustained in another state but destroys the act in toto. If it be objectionable class legislation, it is as ineffectual where an injury is suffered in Iowa as if suffered in another state.

So of the argument that section 2477m21 indicates an intent to limit the operation of the act to the state. In effect, this provision makes the act inapplicable where under certain conditions the employment is in interstate commerce. Passing the question whether sending an employee from the business place of the employer in Sioux City across the state line to haul back a load of furniture in a moving van may be said to be an employment in interstate commerce, it remains true that one hired in Iowa to do work in Iowa may, while performing it, be engaged in interstate commerce. Therefore this particular statute has no relevant bearing on whether the Legislature intended to give the statute operation beyond the state line, and, so far as available, is just as available for some injuries sustained in Iowa as for those suffered in another state. It may properly be added that nowhere in error point or brief point is there any claim that the compensation act is invalid either because it is class legislation, or enters the field of regulating interstate commerce. The complaint is, not that the statute is void, but that while valid it was not intended that it should be applied in a case like the one at bar.

Section 2477m8 provides that failure to give notice within stated times provided shall work a bar to recovery. Section 2477m11, that on request the employee must submit himself to medical examination within a reasonable time. It is argued that these provisions indicate an intent to limit the scope of the statute to the state, because, if the injury were suffered at a great distance from the place of hiring in Iowa, the employee might be prevented from giving notice within the time required, and might be subjected to great hardship to submit to an examination at the place selected by the employer. If this argument is persuasive, it would be equally so as to many injuries that might be sustained within the state. In one set of circumstances, 90 days is allowed wherein to give notice. It is inconceivable in the present state of facilities for communication that distance from the residence of the employer would make it impossible to give him notice within 90 days. Be that as it may, it can well be conceived that it would be as or more difficult to give notice within the prescribed time of an injury suffered within the state as of one sustained beyond its boundaries. Certainly an employer living in Sioux City may be notified of an injury sustained by his employee in Jefferson, S. D., as quickly as if the injury had been suffered in Keokuk. Certainly, where in Texas the employer resides in the northwest corner of the state and the injury is suffered in the southeast corner, there might well be as much delay in getting notice to the employer as if the injury occurred four or five miles from where the employer resides but just across the state line of Texas.

What we have said as to the relative inconvenience in conveying notice of injury applies equally to the right of the employer to require the employee to submit himself to a medical examination. It might well be

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easier for the employee to travel from a point in Nebraska to some point in Iowa for medical examination than if injured in Keokuk to go to Sioux City. It is not amiss to add that the difficulty suggested as to the possible inconvenience in submitting to such examination does not enter into the question at all where both the place where the injury occurred and the death therefrom occurred in another state. The deceased employee cannot be required to submit himself to medical examination anywhere. We are of opinion that these two statute provisions do not overcome the evidence already adverted to that tends to prove the Legislature intended that being injured outside of the state should not nullify a contract for compensation according to the statutes of the state.

4a. Section 2477m6 provides, in effect, that under certain conditions there may be subrogation to the rights of the employee to recover for injury. It seems to be the thought of appellant that the existence of this provision is an argument why the statute cannot have extraterritorial effect. We have already pointed out that, strictly speaking, the question is not whether the statute has or does not have such effect. We are unable to see how the existence of such a provision for subrogation furnishes any reason why an employee who sustains an injury in another state may not have compensation adjusted according to the terms of the Iowa statute.

4b. Section 2477m7 provides that no contract rule, regulation, or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this act except as the act provides. It seems to be the argument at this point that, if an injury suffered in Nebraska may be compensated for according to the terms and conditions of the Iowa statute, it leaves no room for the application of this precautionary statute; that where the employer has rejected the act, and where there is therefore no contractual relation in regard to paying, the employer could defend with some such contract rule, regulation or device. Of course, the answer is, as said, that the parties here do sustain a contractual relation, that the statute must be read into the contract and that therefore the employer would not be permitted to defend with any contract rule, regulation, or device tending to relieve the employer from liabilities created by the act. We are unable to agree that this precautionary protection of the employee against undermining the statute has any tendency to prove a legislative intention that, despite contract to pay for all injuries according to the terms of the compensation act, compensation according to that act cannot be demanded.

V. Section 2477m2b creates a limitation upon the defenses of the employer where he fails to furnish or maintain any safety device required by statute or rule, or violates any of the statutory provisions or rules and regulations now or hereafter in force relating to the safety of employees. And 2477m19 empowers the Iowa industrial commissioner, in co-operation with the employer, to fix standards of safety for safety appliances or for places of employment. It is argued the statute does not require that the employer shall in Nebraska maintain safety devices required by Iowa statutes or rules, and that the commissioner has no power to fix what shall be standards of safety for safety appliances or for places of employment in Nebraska. Section 2477m29 provides, in effect, that the committee on arbitration shall hold its hearings in the city, town, or place where the injury occurred. Section 2477m33 provides for presenting a certified copy of the decision by arbitration committee or commissioner to the district court of the county in which the injury occurred, and that, thereupon, said court shall render decree in accordance therewith. Section 2477m14 authorizes a district judge in certain conditions to make an order commuting future payments to a lump sum. It is argued that, where the injury occurs in another state, the arbitration committee created by Iowa law cannot hold its meetings there; that in such case the award cannot be returned to the district judge sitting where the injury

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occurred because no Iowa district judge does or can sit there; and that no such judge can order such commutation. That is all true. But is it at all relevant? Suppose there had been a written contract providing, in terms, that for injuries sustained either within or without the state compensation should be made on the terms, conditions, and schedules of the Iowa Workmen's Compensation Act. Suppose an injury in Nebraska. All that can be said in the supposed case is that some of the provisions of the Iowa act could not be carried out. The employee would be required to be content with the fact that he had suffered injury which he might possibly have avoided had it been within the power of the Iowa authorities to fix standards of safety in the place where he was injured. Neither party can obtain a sitting of the arbitration committee in Nebraska. It would not be possible to return the award of the committee or commissioner to an Iowa district court or judge sitting at the place where the injury occurred. It would not be possible to have an Iowa judge sitting in that place order a commutation to a lump sum. But how does all this destroy the substantial right to demand an adjustment without litigation and on the terms fixed by the Iowa statute? Some things provided by that statute would respectively not be available to one or the other party. But how can that affect the right to obtain all that is available? Instead of taking that which can be obtained because some other thing may not be, is it not more reasonable to say, in the language of Kennerson v. Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436, that—

"In legislative acts inaugurating a new system not infrequently are found contradictory provisions, and it becomes the duty of the court to reconcile them so far as it can. It does this whenever it is possible in such way as to sustain the act and carry out its purposes."

Aside from the position that what is clearly available may not be lost because something else is not available, and despite the fact that in passing this new legislation it could well have been arranged that everything given by the act would always be available, safe ground as to this whole controversy can be reached by the one holding that it is fairly within the purpose, reason, and intendment of the act to construe it to enact that, as to provisions such as to where the arbitration committee shall sit or as to presenting the award to the district judge, and the like, it is intended where an injury otherwise within the act occurs without the state, "that place" means the place where the contract was entered into. It is no strain upon the manifest purpose of the statute to hold that, where one sustains an injury in another state that is within the provisions of the act, the arbitration committee may meet in the place where the hiring was done, and that, where action on part of a judge or a court is provided for, it shall mean a judge or court having jurisdiction in the place where the contract was entered into. As was said in Kennerson v. Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436:

"In a sense, the injury may be said to have been sustained in the place of the contract, and if appeal is taken, in cases of injury occurring without the state, to the county of the contract, the terms of the act will be reasonably satisfied."

It is our judgment that the award and the action of the district court thereon should be affirmed.

Ladd, C. J., and Evans and Preston JJ., concur.

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SUPREME COURT OF KANSAS.

SMITH
v.
KAW BOILER WORKS CO. (No. 22026.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—PARTIES PLAINTIFF—RIGHT OF RECOVERY—INJURIES "ARISING OUT OF EMPLOYMENT."

The night watchman in a boiler factory was killed while in performance of his duties. He left a widow, who was wholly dependent, as his sole dependent. Before compensation was made the dependent died. The administrator of the estate of the workman sued for compensation. *Held*:

(1) The action was prosecuted by the proper party.

(2) The right to the full amount of compensation allowed by subdivision 1 of section 5905 of the General Statutes of 1915 vested on the death of the workman, and was recoverable, notwithstanding the provision of subdivision 4 relating to discontinuance of compensation on marriage of a dependent and on arrival of a dependent at the age of independency.

(3) The injury to the night watchman which resulted in his death arose out of the employment.

(For other cases, see Master and Servant, Dec. Dig. §§ 373, 388, 400.)

Appeal from District Court, Wyandotte County.

Proceedings under the Workmen's Compensation Act by David J. Smith, as administrator, to recover for the death of his decedent opposed by the Kaw Boiler Works Company, employer. Judgment for claimant, and employer appeals. Affirmed.

O. C. Mosman, of Kansas City, Mo., and McFadden & Claflin, of Kansas City, Kan., for appellant.

J. O. Emerson and David J. Smith, both of Kansas City, Kan., for appellee.

BURCH, J. The action was one for compensation under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216). The plaintiff recovered, and the defendant appeals.

Death of the workman resulted from his injury. He left a widow, who wholly dependent, as his sole dependent. Before compensation was made the dependent died. The action was prosecuted by the administrator of the estate of the workman. The statute provides that, when death results from injury, the action shall be prosecuted by the dependent or dependents entitled to compensation, or by the legal representative of the deceased for the benefit of dependents. Gen. Stat. 1915, § 5930. The defendant says the primary right of action is given dependents, and that the action should have been prosecuted by the administrator of the deceased dependent.

The statute does not, in terms, prefer dependents as plaintiffs. Either dependents or the legal representative of the deceased may sue. When

*Decision rendered, April 12, 1919. 180 Pac. Rep. 259. Syllabus by the Court.

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brought by either the action is well commenced as to the defendant who cannot choose its adversary, and whose sole interest is that it shall not be compelled to pay twice. In this instance death of the widow, the sole dependent, incapacitated her to sue, and if the statute be followed literally, no one but the administrator of the deceased workman could sue. However this may be, the action was prosecuted by a statutory agent expressly designated for the purpose, and the defendant may not complain.

The statute relating to the amount of compensation reads as follows:

"The amount of compensation under this act shall be: (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount equal to three times his earnings for the preceding year but not exceeding thirty-six hundred dollars and not less than twelve hundred dollars. * * * (4) Marriage of any dependent shall terminate all compensation of such dependent, but shall not affect compensation allowed other dependents; when any minor dependent, not physically or mentally incapable of wage earning shall be come eighteen years of age, such compensation shall cease." Gen. Stat. 1915, § 5905.

The defendant says the amount of compensation recoverable was whatever accrued between the death of the workman and the death of the dependent. The plaintiff says the entire amount accrued immediately on the death of the dependent.

The section quoted was originally section 11 of chapter 218 of the Laws of 1911, the first attempt at workmen's compensation legislation. In 1913 a number of changes were made in the law. Except for a minor modification not now material, the only amendment of section 11 was by the insertion of subdivision 4, relating to marriage and arrival at the age of independency. Laws 1913, c. 216, § 7. It is difficult to determine just what the Legislature had in mind, and, not seeing its way clear to an authentic general interpretation, the court, for present purposes will treat the provision as discontinuing compensation on the happening of the events specified.

There can be no doubt that under the act of 1911 the amount of compensation was a single sum, definitely ascertainable by a prescribed method, the right to which became fully vested in the widow on the death of her husband. United Collieries v. Hendry, [1909] App. Cas. 383; Munding v. Industrial Comm., 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162. The act of 1913 discontinued payment of compensation in just two instances—marriage of the dependent, and arrival at the age of independency. Death of the dependent after death of the workman was not added as a third disability, and consequently is not a bar to recovery of the full sum specified in subdivision 1.

The deceased workman was night watchman in a boiler factory, and was killed by burglars while in the performance of his duties. It is said the hazard was not one which inhered in or was peculiarly incident to operation of a boiler manufacturing plant, and consequently that the injury did not arise out of the employment.

A fair statement of the rule under the rather limited statute of this state is that the injury must result from some danger peculiar to the hazardous character of the employment. This does not mean, however, that in a factory classified as extrahazardous because of the use of dangerous machinery none but machine operators or employees working in proximity to machinery may have compensation. Regarding for the moment the operating of machinery as the acme of the employment, all that combines to make it such, everything integrated with it essential to effective functioning, other conditions being fulfilled, is included in the hazard. The principle is well illustrated in the case of Matter of Larsen v. Paine Drug Co., 218 N. Y. 252, 112 N. E. 725. The drug company was engaged in the hazardous business of manufacturing drugs and chemicals. Larsen was porter, elevator man, and general handy man, who took in freight, packed

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goods, and did small repair work. He was injured while building a shelf near an elevator well. The court said:

"Appellants' second proposition means that a person engaged generally in an employment which has been defind as hazardous cannot recover compensation for injuries received while performing some act not immediately connected with what might be deemed the hazardous and characteristic feature of the business, although such act was incident to the employment and necessary in prosecuting and carrying forward the business. * * *

"We think this is too narrow a view of the statute, and would lead to limitations upon its application which were not intended or anticipated by the Legislature. It is not necessary to attempt to lay down a final and universal rule on that subject. We feel perfectly secure, however, in holding that where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed." 218 N. Y. p. 255, 112 N. E. 726.

It is stated that in the present case the watchman was killed in the factory. There is no contention that a night watchman was not necessary to the security of the plant, and so to the maintenance and prosecution of the defendant's business.

The judgment of the district court is affirmed.

All the Justices concurring.

SUPREME COURT OF LOUISIANA.

DAY

v.

LOUISIANA CENTRAL LUMBER CO. (No. 22673.)*

3. MASTER AND SERVANT—PRICE OF MANUAL LABOR—EMPLOYERS' LIABILITY.

The Employers' Liability Act, making rights and remedies thereunder exclusive, does not undertake to fix the price of manual labor contrary to Const. art. 51.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Monroe, C. J., dissenting.

Appeal from Thirtieth Judicial District Court, Parish of La Salle; F. E. Jones Judge.

Suit by L. H. Day against the Louisiana Central Lumber Company, for damages, or in the alternative for compensation. Exception of no cause of action sustained as to right to proceed for damages, and overruled as to right to compensation, and judgment for plaintiff for compensation, and both parties appeal. Judgment rejecting plaintiff's demand for damages affirmed, and defendant's appeal from judgment allowing plaintiff

*Decision rendered, March 3, 1919. Rehearing denied March 31, 1919. 81 S. Rep. 328. Syllabus by Editorial Staff.

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compensation under Employers' Liability Act transferred to the Court of Appeal, Second Circuit.

Perrin & Perrin, of Jena, for plaintiff.
Thornton, Gist & Richey, of Alexandria, for defendant.

O'NIELL, J. This suit was brought by an employee against his employer, primarily for $15,000 damages, and in the alternative for $950.25 compensation, for personal injuries received by plaintiff while performing services arising out of and incidental to his employment.

The primary demand for damages, is founded upon allegations of fault and negligence on the part of the employer, and upon plaintiffs contention that section 34 of Act No. 20 of 1914, the Employers' Liability Act, purporting to deprive an employee of a right of action against his employer for damages for personal injuries received while performing services arising out of and incidental to the employment, or making the rights and remedies granted by the statute in such case exclusive of all other rights or remedies, is unconstitutional.

Defendant filed a plea or exception of no cause or right of action for damages or for compensation. The district court, declaring Act No. 20 of 1914 valid, maintained the exception of no right of action for damages, and rejected plaintiff's primary demand. The court overruled the exception to the suit for compensation, and, after hearing evidence on that claim alone, in the form of an admitted statement of facts, gave judgment in favor of plaintiff for the amount of compensation sued for. Plaintiff appealed from the judgment rejecting his demand for damages, and defendant appealed from the judgment allowing compensation under the statute.

The only question presented by plaintiff's appeal from the judgment rejecting his demand for damages is whether Act No. 20 of 1914 is unconstitutional for any of the reasons urged. The arguments advanced are:

First. That the statute is an attempt to deprive every injured employee of an adequate remedy by due process of law, for personal injuries received, and therefore violates article 6 of the state Constitution.

Second. That the statute is an attempt to grant to certain corporations an exclusive privilege or immunity, and therefore violates the fourteenth paragraph of article 48 of the state Constitution.

Third. That the statute violates article 51 of the state Constitution, declaring that no law shall be passed fixing the price of manual labor.

Fourth. That the statute violates the Seventh Article of Amendment of the Constitution of the United States, declaring that, in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.

Opinion.

[1] 1. We have heretofore considered, and have reconsidered the question several times, whether section 34 of Act No. 20 of 1914 is violative of article 6 of the state Constitution; and we adhere to our ruling that the law is not invalid in that respect. See Whittington v. Louisianna Sawmill Co., 142 La. 322, 76 South. 754, Boyer v. Crescent Paper Box Factory, 143 La. 368 78 South. 596, and Philps v. Guy Drilling Co., 143 La. 951, 79 South. 549.

[2]. 2. Article 48 of the Constitution, in terms, applies only to local or special laws. Act No. 20 of 1914 is not a local or special law. It does not purport to grant any special or exclusive right or privilege or immunity to any corporation, association, or individual, or to any class of corporations, associations, or individuals.

[3] 3. Regarding article 51 of the Constitution, it is sufficient to say that Act No. 20 of 1914 does not undertake to fix the price of manual labor.

[4] 4. As to the seventh article of amendment of the federal Constitution, guaranteeing the right of trial by jury in all suits at common law

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where the value in controversy exceeds $20, it is sufficient to say that that constitutional guaranty applies only to actions in the federal courts, not to proceedings in state courts.

Finding no merit in any of plaintiff's attacks upon the constitutionality of the section of the Employers' Liability Act that makes the rights and remedies therein granted to an employee, for personal injuries, exclusive of all other rights and remedies, our conclusion is that the judgment denying plaintiff a right of action for damages is correct.

[5] The alternative demand for compensation is for an amount less than $2,000, and is therefore not within the jurisdiction of this court. Const. art. 85. Defendant's appeal from the judgment rendered on that demand must be transferred to the Court of Appeal.

The judgment rejecting plaintiff's demand for damages is affirmed; and it is ordered that defendant's appeal from the judgment allowing plaintiff compensation under the Employers' Liability Act be transferred to the Court of Appeal, Second Circuit. The costs of the appeal to this court are to be borne equally by plaintiff and defendant; all other costs are to depend upon the judgment of the Court of Appeal.

Monroe, C. J., dissents.

COURT OF APPEALS OF MARYLAND.

STATE ACC. FUND ET AL.

v.

JACOBS. (No. 89.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"CASUAL EMPLOYEE."

The question whether an employment is "casual," within the meaning of the Workmen's Compensation Act, must be determined with principal reference to the scope and purpose of the hiring, rather than with sole regard to the duration and regularity of the service.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"CASUAL EMPLOYEE."

A farmer and teamster engaged by a canning factory early in the canning season to do hauling at such times as he might be needed during the season at a certain rate of pay, the hauling being a necessary part of the employer's business, was not a "casual employee," within the meaning of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

Appeal from Circuit Court, Caroline County; W. H. Adkins and Philemon B. Hopper, Judges.

Proceedings by Julia Jacobs under the Workmen's Compensation Act to obtain compensation for the death of her son. From an order in favor of the applicants, the State Accident Fund and the State Industrial Accident Commission appeal. Order affirmed, and case remanded.

*Decision rendered, March 5, 1919. 106 Atl. Rep. 255.

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Argued before Boyd, C. J., and Briscoe, Burke, Thomas, Pattison, Urner, and Stockbridge, JJ.

Ogle Marbury, Acting Atty. Gen., and Philip B. Perlman, Asst. Atty. Gen. (Albert C. Rtchie, Atty. Gen., on the brief), for appellants.
T. Alan Goldsborough, of Denton, for appellee.

URNER, J. The appellee's son was fatally injured by being thrown against a post as he was driving a wagon loaded with canned tomatoes out of the packing factory of his employer. The only question to be decided on this appepal is whether he was a "casual employee" within the meaning of the Maryland Workmen's Compensation Act, which excepts "casual employees" from its provisions. Code, art. 101, § 63 par. 3.

The injured man, who was a farmer and teamster, had been employed to do hauling for the factory whenever he was needed for that service. His employer testified:

"He was engaged to me early in the canning season to work for me at such times as I might need him, and he promised to help me out at all such times as I might call upon him, and he did so; the day of the accident being the last of the work he had for the season."

To the question, "Was there no separate engagement or contract of hiring for the work he was doing on the day of the accident?" the employer replied:

"Nothing more than just to tell him to come; the same wages paid all the time, always during the season the same wages."

Under this general engagement, the teamster who was injured had been called upon repeatedly for hauling service in the course of the packing season, being paid at the uniform rate of $3 per day when he hauled with his own team, and $1.50 per day when a factory team was used.

The Workmen's Compensation Act of this state does not define the term "casual," as therein used to describe one of the classes of employees to whom the act is not intended to apply. It is a purely relative term, and, in the absence of a statutory definition, its application should be determined in each case according to the particular facts presented. The act defines an "employee" to be:

"A person who is engaged in an extrahazardous employment in the service of an employer carrying on or conducting the same upon the premises or at a plant, or in the course of his employment away from the plant of his employer."

There can be no dispute as to the fact that the appellee's son was an "employee," within the definition of the act, at the time he was injured; but it is contended that his employment was so irregular that it should be characterized as only "casual," within the meaning of the act, and therefore expressly excluded from its operation.

[1] The question whether an employment is casual must be determined with principal reference to the scope and purpose of the hiring, rather than with sole regard to the duration and regularity of the service. One who enters into a contract of employment for an entire season is not a casual employee merely because he may be required to work for only short and irregular periods. When there is a continuing engagement to serve the employer in his business at such times as the particular and essential service may be needed, the employment is not "casual" according to any of the judicial definitions of that term. In this case the service required and rendered was occasional, but it was in pursuance of an engagement covering the whole of the working season at the employer's plant.

In Sabella v. Brazileiro, 86 N. J. Law, 505, 91 Atl. 1032, where a longshoreman was employed at a certain sum per hour to help load a ship, having frequently rendered similar service to the same employer on pre-

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vious occasions, it was held that the employment was not casual under the New Jersey Employers' Liabilty Act (P. L. 1911, p. 134). It was decided in Boyle v. Mahoney, 92 Conn. 404, 103 Atl. 127, that one who kept machinery and boats in order at an amusement park, whenever called upon for such service was not a casual employee within the meaning of those words as used in the Workmen's Compensation Act of Connecticut. In Jordan v. Weinman 167 Wis. 474, 167 N. W. 810, a boy who was called in at irregular intervals for service in a butcher's shop, when extra help was needed, or in the absence of a regular employee, was held not to be serving under a casual employment within the terms of the Workmen's Compensation Act of Wisconsin (Laws 1911, c. 50). Also in Dyer v. James Black M. & C. Co., 192 Mich. 400, 158 N. W. 959, where a man employed in other work on a building was engaged to assist in unloading glass as it arrived from time to time for use in the same building, it was held that the latter employment was not casual, under the Workmen's Compensation Law of Michigan (Laws 1912 [Ex. Sess.] No. 10), though there was an interval of ten days between the only two occasions when the service was performed. But in Hill v. Begg (1908) 2 K. B. 802, where there was no regular engagement for the service, it was held that the employment of a man at intervals to clean windows was of a "casual nature" under the provisions of the British Workmen's Compensation Act. Likewise in Cheever's Case, 219 Mass. 244, 106 N. E. 861, the employment of a teamster at various times to haul coal from the employer's coalyard was held to be casual under the Workmen's Compensation Act of Massachusetts (Laws 1911, c. 751, amended by Laws 1912, c. 571), and in Gaynor v. Standard Accident Ins. Co., 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363, a similar conclusion was reached in reference to the employment of a waiter by a caterer to serve at a banquet, the engagement having no relation to any past or future hiring between the same parties. Other cases in which occasional employments were held to be casual, and hence not yet subject to the operation of statutes providing for such exceptions, are Md. Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031; Chicago Great Western R. Co. v. Industrial Commission, 284 Ill. 573, 120 N. E. 508; Thede Bros. v. Industrial Commission, 285 Ill. 483, 121 N. E. 172 McLaughlin v. Industrial Board, 281 Ill. 100, 117 N. E. 819; Aurora Brewing Co. v. Industrial Board, 277 Il. 142, 115 N. E. 207; Western Union Tel. Co. v. Hickman, 248 Fed. 899, 161 C. C. A. 17.

[2] The work in which the appellee's son was engaged when he received the injury which caused his death was a necessary part of his employer's business. It was a service rendered under an employment which was not limited to the hauling then in progress, but applied every occurring occasion for such assistance during the whole of one of the annual productive periods of the employer's enterprise. Upon the facts of the case we agree with the ruling of the court below that the employment was not casual within the meaning of the statutes and that the appellee is entitled to compensation under its terms.

Order affirmed, with costs, and case remanded.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

EMACH'S CASE.*

1. MASTER AND SERVANT—LENDING MACHINE AND SERVICE—CHANGE OF EMPLOYMENT—PRESUMPTION.

Where person in general employment of contractor assists, with machine or other appliances belonging to contractor, in work of subcontractor or other employer to whom he is lent, he may become, with his consent, servant of the other contractor or special employer, but there is a rebuttable presumption that in management of machine or appliance he remains servant of general employer.

(For other cases, see Master and Servant, Dec. Dig. §§ 361, 403.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CHANGE IN EMPLOYMENT—FINDING OF INDUSTRIAL ACCIDENT BOARD—EVIDENCE.

In proceedings for compensation for death of engineer of locomotive crane lent by contractor to subcontractor, finding of Industrial Accident Board that engineer did not become servant of subcontractor in care and management of crane, but in such respect remained employee of contractor, *held* supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW — FINDING OF INDUSTRIAL ACCIDENT BOARD.

Where there was evidence to support finding of Industrial Accident Board on a question of fact, such as whether engineer of locomtive crane lent by contractor to subcontractor became servant of latter in respect to management of crane Supreme Judicial Court cannot set finding aside.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Mabel B. Emach for compensation for the death of Albert M. Emach, the employee, against the Aberthaw Construction Company and the Holbrook, Cabot & Rollins Corporation, as employers, and the Contractors' Mutual Liability Insurance Company and the Travelers' Insurance Company, as insurers. Compensation was awarded against the Contractors' Mutual Liability Insurance Company, and denied as against the Travelers' Insurance Company, and from the decree of the superior court ordering payment by the Contractors' Mutual Liability Insurance Company, and dismissing the claim against the Travelers' Insurance Company, the claimant and the Contractor's Mutual Liability Insurance Company appeal. Affirmed.

Peter F. McCarty, of Boston, for appellant Emach.

Norman F. Hesseltine, J. Frank Scannell and J. Waldo Bond, all of Boston, for appellant Contractors' Mutual Liability Ins. Co.

Walter I. Badger and Louis C. Doyle, both of Boston, for appellee Travelers' Ins. Co.

CARROLL, J. Albert Emach, employed by the Aberthaw Construction Company as the engineer in charge of a locomotive crane, received a fatal

*Decision rendered, April 17, 1919. 123 N. E. Rep. 86.

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injury. Holbrook, Cabot & Rollins Corporation, a subcontractor, on March 13, 1918, wrote to the Aberthaw Company stating that it required a locomotive crane to act "as auxiliary to our derricks, also to provide motive power for getting piles from the pile yard out to the wharf. We understood from Mr. Garrod that the crane would be forthcoming and could be held absolutely at our disposal for the continuance of our work." On the following day the supervisor of the Aberthaw Company replied, saying that the company "has furnished you at Squantum this morning, March 14, 1918, with one locomotive crane equipped with a 50-foot boom, and one standard flat car. * * * Please note that the Aberthaw Construction Company will furnish the engineer and fireman on the locomotive crane throughout its work for you."

The following Sunday morning (March 17, 1918) Green, a rigger employed by Holbrook, Cabot & Rollins, ordered Emach to go to the dock and hoist an engine from the deck of a lighter to a flat car. The crane was run down to the dock, employees of the subcontractor adjusted the chains about the engine and connected them with the hoisting tackle of the crane. The crane was equipped with jacks to support the platform when lifting, and clamps to fasten the crane to the rail. Neither the jacks nor clamps were in use when the employee was killed. Before attempting to hoist the engine, Emach's firemen asked Green its weight, to which Green replied, "From 4½ to 5 tons." The fireman then said, "you think that is a 30-foot radius?" and Green answered, "Yes." The fireman then looked at the guideplate on the crane and saw that with a 30-foot radius the crane could lift 11,500 pounds. After this conversation, Green gave Emach the signal to hoist the engine. As soon as the crane started it became unbalanced by the heavy burden and turned over on its side, so severely scalding Emach that he died in a few hours.

Both the Aberthaw Company and the Holbrook Company were insured under the Workmen's Compensation Act. (St. 1911, c. 751, as amended by St. 1912, c. 571.) The Industrial Accident Board awarded compensation against the insurer of the Aberthaw Construction Company in favor of Mrs. Emach, the employee's widow. She appealed, in order to protect her rights against the Holbrook, Cabot & Rollins Corporation, in case it should be found that the Industrial Accident Board was in error. The insurer of the Aberthaw Company also appealed.

[1] Where a person in the general employment of a contractor assists with a machine or other appliance belonging to the contractor, in the work of an employer to whom the servant is lent, the person so lent may become, with his consent, the servant of the special employer. But in such a case it will be presumed that in the management of the machine or appliance the employee in charge remains the servant of the general employer and does not become the servant of the special employer. Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648; Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Peach v. Bruno, 224 Mass. 447, 113 N. E. 279; Clancy's Case, 228 Mass. 316, 117 N. E. 347; Scribner's Case, 231 Mass. 132, 120 N. E. 350.

This presumption, however, may be overcome by evidence to the contrary; and the facts may be such as to warrant the finding that the owner of the machine has so far surrendered the right of control that even in this particular the person in charge of the machine has become the servant of the special employer. See in this connection Scribner's Case, supra; Cain v. Hugh Nawn Contracting Co., 202 Mass. 237, 88 N. E. 842.

[2, 3] In the case at bar there was evidence upon which the Industrial Accident Board could have found that Emach, in the operation and management of the locomotive crane, became the employee of the Holbrook, Cabot & Rollins Corporation. The correspondence between the two corporations indicates that the crane was to be at the disposal of the Holbrook, Cabot & Rollins Corporation. There was evidence that, when Emach and

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his fireman started the work for the Holbrook Company, they were informed by the master mechanic of the Aberthaw Company "to do absolutely as they were told by the subcontractor," and that they made no objection to this direction. But the Industrial Accident Board was called upon to decide a question of fact; and it might well have found that, even if Emach was temporarily in the employment of the Holbrook, Cabot & Rollins Corporation, in the care and operation of the crane he remained the employee of the Aberthaw Company. It could have found that the crane was a complicated machine, requiring experience and skill in its operation; that Emach was an experienced engineer and that the control was left entirely to him, with no direction for its management given by the Holbrook Company. It does not appear that any one employed by the subcontractor understood how to operate the crane, and the master mechanic of the Aberthaw Company testified that "Mr. Emach was supposed to know what the crane would lift on a certain job, and it was left to Mr. Emach to use his judgment as to how much he should lift. If Mr. Emach was told to lift a greater load than the crane would stand, he would be supposed to say that the crane would not stand it," and "for the protection of the crane as property of the Aberthaw Company * * * was expected to do only work which would not endanger the crane." On this evidence the board found that Emach did not become the servant of the Holbrook, Cabot & Rollins Corporation in the care and management of the locomotive crane, but in this respect remained the employee of the general employer. We cannot say that this finding was wrong The question was one of fact; there was evidence to support the finding, and we cannot set it aside.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

McCARTHY'S CASE.

IN RE TOWN OF DANVERS.

IN RE EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—OPPORTUNITY TO ESCAPE INJURY—SUFFICIENCY OF EVIDENCE.

Finding of Industrial Accident Board that employee, who suffered sunstroke, had no opportunity to escape effects of exposure to heat before he collapsed, *held* warranted by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF EMPLOYMENT"—SUNSTROKE.

Where town's employee, who worked in gravel pit, suffered a sunstroke, injury arose out of his employment, which exposed him to danger of sunstroke, an injury naturally connected and reasonably incident to em-

*Decision rendered, April 11, 1919. 123 N. E. Rep. 87.

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ployment, as distinguished from ordinary risk which general public is exposed to.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation for injuries under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571) by John E. McCarthy, the employee, opposed by the Town of Danvers, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court, and from its decree the insurer appeals. Affirmed.

All the material evidence introduced at the hearing follows:

Dr. James E. Simpson, testified:

That he is from Salem and has been practicing for 28 years; that he is a graduate of the Harvard Medical School; that he spent one year as resident surgeon at the Salem Hospital and then engaged in general practice of medicine in Salem; that he has testified many times on cases in court for the defense. The employees counsel questioned the doctor: Assuming a man is in a gravel pit, which is closed on three sides on a day when there is little or no air, working there with pick and shovel in the company of other men, and he is sunstruck, suffering from heat prostration, and it is found as a fact that he was subjected to a materially greater danger of sunstroke on August 2, 1917, last year, what knowledge would he have that he was suffering from heat prostration? (Mr. Gleason objects to the question on the ground that he does not feel that this is evidence that bears on the purpose for which case is recommitted. The objection is overruled by Mr. Kennard.) Dr. Simpson further testified that he is a medical examiner and has been for 16 years; that he has attended sunstroke cases, fatal and otherwise; that as medical examiner, he has made reviews of persons who had suddenly died from heat prostration or sunstroke before a doctor was called on such cases; that occasionally in the summer months he has had cases of sunstroke and in 1911, during the extreme heat, about the 1st of July, he reviewed 23 bodies, people who have dropped dead or died from heat exhaustion; that he also treated persons who did not meet with favorable results; that he has treated patients for heat exhaustion—men in the military service for several years—men in the encampment, who dropped from heat; that there are certain definite signs by which he can determine heat prostrations. Dr. Simpson stated in answer to first question objected to by counsel for insurer, that his opinion is that the length of time which elapses between the time when a man begins to get the first symptons, knocked out and incapacitated from sunstroke, is an unappreciable length of time; that the man begins to feel that the heat is affecting him; that he drops from exhaustion; that the heat affects his head in the beginning, affects his intelligence; that he gets into a stupor or unconscious condition; later things get dark before him, he becomes faint and assumes the thing is beginning to affect him; that he has a hazy knowledge of things; that he does not know, before the things do, get him all of sudden, that he is any different from his usual condition. Dr. Simpson stated further he has a general knowledge of the intensity of the heat in a sand pit surrounded as indicated.

Cross-examined, the doctor testified:

That the immediate effect of a sunstroke on the body is a congestion, particularly of the blood vessels of the brain; the heart action becomes rapid and much increased, there is a sudden rise in the temperature of the body and in cases which get well, the conditions which he has described gradually disappear and the man is restored to normal; in other cases, the men collapse after a little while and die from the collapse; and in

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certain other cases they get partly well and some definite change is left in the brain which incapacitates them afterwards, even though they don't die. The direct effect of the heat is what causes the rise in temperature, and then something takes place in the system whereby a man becomes, in a measure, sort of toxic and poisoned from internal conditions because the tissues are in such a state they cannot resist the effect of things which ordinarily ought to be taken care of internally in the system. Persons who have sunstrokes have to be subjected to heat; he should think they would have to be subjected more than a minute; of course, it is indefinite. One cannot tell the length of time because certain individuals have less resisting power than others; some get acclimated in a way and how long they have to be subjected to the heat is a matter that cannot be determined in any definite case. He should suppose that the resisting power of a man not acclimated would be less than that of a person who was used to the heat. A week or frail person's resisting power would be less than that of a husky person. He has no way of determining in a given case how long the heat is affecting a person; there are many features that govern that besides the resistance of the thing. There are cases where men work day after day, all summer long, in excessive heat, and never get a heat stroke. There are cases of heat stroke where the person needs to be exposed two or three hours before the heat overcomes him; there are persons who can be exposed to heat any length of time and never get overcome, where others will be overcome under the same conditions; when it comes, it comes all of a sudden—there is no leading up to it. A man has to be in the heat some time before his organs suddenly give out and refuse to work. What that period may be, nobody can tell. He knows nothing about McCarthy except what he was told to-day. A man who is working in a hot place, if he is a man of normal mentality, knows it. "We all know that when we are working in a hot place, we are liable to get a sunstroke." He knows nothing about August 2d except what he has been told.

"Q. You do not know whether it is a fact that 13 people died on that day of heat prostration? A. I don't.

"Q. I understood you to say that when a heat prostration comes on, there are practically no premonitory symptoms, as you call them? A. Yes. Either momentary, or else the man doesn't know a thing until he drops. By premonitory symptoms he means that when a man has a mild stroke, or a stroke of insufficient intensity to knock him out at once, he begins to feel heavy-headed, dizzy, faint, things grow dark before him, he staggers, feels weak, prostrated, and drops. He may not get to the state of collapse, unconsciousness. He may revive after a few minutes, if he lies down. Insolation is the medical term for sunstroke; that is the term that governs all cases from mild ones that revive up to the ones that die in a few minutes. There is a difference in the symptoms, depending on the severity of the case; in severe cases a man does not have time to get premonitory feelings from which he revives, if it is a slight case; he does not remember anything about it, simply drops in his tracks, and is carried off unconsicous, perhaps going on to a condition of collapse and death; if a person is fighting for him, he may bring him around.

"Q. Is it true that the longer a person stays in the heat, the more serious will be the condition? A. I don't know that that would have direct bearing. It is not always so that the persons who have the slight sunstrokes are the weaker persons. The first thing a man notices is a headache, feels stupid, weak, cannot move himself up, gets dizzy, staggers. The headache is coincident with the condition; there is no particular order, the whole group of symptoms appearing at the same time. The headache comes on immediately before the man drops."

He has seen men hold themselves up for a short length of time; that short length of time might be a moment or a few minutes; he cannot tell exactly. Before the headache comes on, he does not think a man feels anything; this thing hits him all of a sudden. A person working in the

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heat feels hot; he feels the heat when he is not working. If a man feels hot, stops work and receives treatment, he supposes the sunstroke is more likely to be avoided than if he continues. He has seen people get sunstruck who were not working, but were in the shade in their own houses. On a hot day when the temperature is 90 degrees, a person in the shade in his own house is not just as likely to be overcome, but he may be overcome. Whether or not a person will have sunstroke if he stops working before the premonitory symptoms come on is speculative; he thinks one cannot tell who the individuals are who will not be overcome by the heat on a hot day; of course, he realizes that the man who gets the greatest degree of exposure is the man who will be more likely to be affected; it is not only the temperature, but largely a question of the humidity that has a bearing upon the thing. He thinks that avoiding a sunstroke is a good deal like avoiding being struck by lightning, as far as selecting the people who will not be the victims, is concerned. A man cannot tell any better that he is going to be struck by the heat than he can that he is going to be struck by lightning. (Counsel for claimant objected to last question and answer.) If a man is exposing himself to the heat, if he stops to think of it, he knows that it is a hot day and something may happen to him; when a man is out in a thunder storm, and he stops to think of it, he thinks that he may get struck, but neither man can tell that he is going to be.

On redirect examination, witness testified:

That he thinks sunstroke is always sudden. (The last question was objected to by counsel for the insurer on the ground that it was nothing that was opened up on cross-examination. Chairman of the board allowed the question.) Whether or not a man will be affected depends partly upon the general makeup of the man. One cannot tell which persons are going to be victims either of sunstroke or lightning when men are exposed to the same conditions.

In answer to Mr. Kennard, witness stated:

That he thinks that an examination of the man one-half hour before he was overcome, by a man skilled in the treatment of sunstroke cases, would not have shown anything; there would have been no change that could have been discovered until the man was affected by the heat suddenly. All of the occupants of this hearing room might be exposed to similar conditions; perhaps none of them would be overcome; perhaps one would be overcome; no one can tell why that one should have been overcome more than the others. When soldiers, rugged men of equally good physical condition, are on parade, some will fall in the ranks and be carried off with heat prostration, others will not be affected at all. If the occupants of the hearing room went out and engaged in violent exercise on a hot day, there would be more likelihood that some would be stricken with the sun than if they stayed in the room.

Being questioned by Mr. Parks, the doctor testified:

That when a sunstroke is beginning to come over a man, it is a condition rather to put him off his guard as far as his safety is concerned.

Questioned by counsel for insurer, witness stated:

That at the time of sunstroke, the heart begins to beat very violently, the pulse bounds becomes strong and full, the face becomes flushed and the blood gets congested in his brain and head so that it begins to stupefy him and give him a headache and a heavy feeling.

George W. Giles, called by the claimant, testified:

That he lives at 158 High street, Danvers, and his business is that of carpenter. On August 2, 1917, he was working in the pit with Mr. McCarthy. (Counsel for the insurer objects to all evidence that has no bearing on what was agreed was the issue.) He went to work at 7 o'clock in the morning and worked until about 11. (Mr. Gleason objects.) He

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saw Mr. McCarthy on the job that morning. Mr. McCarthy was shoveling and picking. (Objection by insurer overruled by chairman. The objection is a general one and the ruling a general one.) He (Mr. McCarthy) and the rest of the men were filling cars with gravel for the town of Danvers. There was a motor truck and the other cars the men pushed. He saw Mr. McCarthy just before he was sunstruck. Mr. McCarthy was working on the next truck. If he is not mistaken, there were five men working on the truck besides himself, some shoveling and some picking. Mr. McCarthy was working on the motor truck and he was working on a truck on the other side, about 30 feet away, more or less. He saw Mr. McCarthy come across for water which was behind a pile of piping. He did not pay any attention to him. When he turned again, Mr. McCartny was staggering towards the truck. He and another man went over to Mr. McCarthy and carried him into the shade, put ice on his head, gave him some water and ginger and sent for a doctor. Mr. McCarthy looked like a person who was pretty sick and seemed to be dazed. It was only a few minutes between the time Mr. McCarthy went to get the drink and the time he saw him going back towards the truck. When the trucks are filled, they are sent to the men building the roads to keep them working. There was only one truck to take the gravel to the men on the roads. The work done in the pit required that the men work steadily for the purpose of keeping that truck going. They were kept working pretty regularly on the morning of August 2.

Questioned by chairman:

Mr. McCarthy was filling the truck just before he went to get the water, using a pick sometimes and sometimes a shovel.

Continued direct examination:

He did not know of any orders to quit that day before Mr. McCarthy was taken down. He cannot say exactly how many men were on the shoveling job with Mr. McCarthy; there are sometimes six, sometimes five and sometimes four. The time required to fill a truck varies; it might take half an hour or it might only take 15 minutes, depending upon the number of men, and the condition of the shovel.

Cross-examined, the witness testified:

That he was filling a different car from the one Mr. McCarthy was filling. The men pushed the car he was filling. There were four on his car. There were 12 or 14 men all told working in the pit. There would be days when a man would stay out of work. When one man would be out a day, the rest would keep on working just the same. All the men did about the same kind of work. One truck was higher than the other. On the day Mr. McCarthy was taken sick, the rest of the men did not continue working. He did not work that afternoon becaues he considered it was a little bit to hot to work.

Questioned by chairman:

To his knowledge, there was no objection to his stopping work.

Continued cross-examination:

When Mr. McCarthy went away from the drinking place, he was staggering. When he was going toward the drinking place, he did not notice that Mr. McCarthy was in the condition he was in a short time afterwards.

Frank H. Harrigan, called by the claimant, testified:

That he lives at 15 Porter street, Danvers. On August 2, 1917, he was employed by the town of Danvers working in the pit with Mr. McCarthy. (Insurer made same objection as in the testimony of previous witness; same ruling made.) The work was picking and shoveling into cars and trucks. The cars run on rails. There were about 10 or 12 men there at the time. He was as near to Mr. McCarthy about 11 o'clock on

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August 2 as he was to door of hearing room. When he last saw Mr. McCarthy, he was shoveling onto the truck accompanied by five or six other men. It took about one-half hour to fill a truck. When the truck is filled, it is taken out to the street workers using the steam roller. He saw Mr. McCarthy when he went after the drink of water, having passed him on the way. Mr. McCarthy came back past him and was staggering. The men got to Mr. McCarthy before he fell and took him to the shed where he was attended by the doctor. He did not notice Mr. McCarthy particularly when he started after the water. They had worked pretty steadily that morning, having started about 7 o'clock and continuing to 11 o'clock. They worked continuously in the sun. Everybody stopped at 11 and went home. Mr. McCarthy went about 20 feet from where he was standing, and was retracing that 20 feet when he saw him staggering. It was probably two or three minutes from the time he passed him to go to the water until he came back.

Cross-examined, the witness testified:

That Mr. McMCarthy was working about 15 or 20 feet away from him and the water was about 20 or 30 feet away from Mr. McCarthy the other way. The men stayed with Mr. McCarthy until the doctor took him away and then they went home. He thinks Mr. Whittier had left before the doctor arrived. Nobody made any objections because he and Mr. Giles went home.

"Q. That is, you understood that you were at liberty to stop work if you wanted to? A. We understood that after McCarthy was taken sick. Mr. Whittier knocked us all off. Mr. Whittier told them they had better quit. He was not told by anybody that he could not quit work that morning. If they wanted to quit work, they could, and lose a day's pay.

George W. Whittier, called by the claimant, testified:

That he lives at 13 Essex street, Danvers. On August 2, 1917, he was foreman and had charge of the men and material in the pit. The men in the pit were feeding gravel part of the time and perhaps stone part of the time. (Insurer objects to this line of testimony on the ground that it is not material to the issue.) The men were feeding a motor truck and a stone crusher. After the material was prepared for the truck, the truck was taken on the road. There was a road gang building and repairing the roads and using the steam roller. There were from four to six men in the gang road building. (Insurer objects specifically to last question.) From four to six men spread the material and prepared it for the roller. In order to keep that number of men going, it required from ten to twelve men in the pit. At this particular time there was a shortage of help. Mr. McCarthy was not a resident of Danvers; he lived in Salem and was hired through an advertisement in the paper which witness inserted for help, at $3, eight hours a day. He was in the lower pit at the time Mr. McCarthy was sunstruck. His attention was first called to the fact that Mr. McCarthy had been sunstruck when he saw him lying in the shade in company with Mr. Giles and Mr. Harrigan. He cannot say how long he had been away from where Mr. McCarthy was before he was struck. In order to do the work, he was anxious to have the men continue to work. Mr. McCarthy was there that morning, doing picking and shoveling. The men were working filling trucks that ran on tracks. As they left the place where they were filled, they went into some sort of a bin. If he had ten men, he would have five on each car; if he had twelve, it would be six to each car. He cannot say how many men were on the car with Mr. McCarthy at the time. They had two push cars running that day, and the men on the ground were evenly divided. When the cars were filled, the men would push them down the incline. In the meantime another one would come back and the men would keep it moving all the time. He thinks he told the men to go home after Mr. McCarthy had been stricken because of the heat of the day. If one or two or

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three men stopped work, it would "bother" the work very much, and he would not be able to get the work out as well as would be required to keep the crew on the street. It would stop the men from going along to the degree they were supposed to work. They could not get enough material up to them. He testified at the previous hearing.

Cross-examined, the witness testified:

That he supposes some day he had nine men working; sometimes a man would not come in to work. When a man did not come in to work, he would take a man from the crusher so as not to break up the crew. On the day of this accident, he does not know whether he had ten or twleve men working. If one man quit work on that day, the work would still go on in the pit. One man away would make a great deal of difference in some respects. He had men working on the crusher the day of the accident. He does not know how many men were working on the road that day. He does not know whether one of the men quit because of the heat. He does not remember whether or not he told the men to quit on this particular day. What he said at the last hearing was true. His memory is just as good to-day of things at that time, as it was at the last hearing. If he testified in Danvers that he told the men they could quit if it got too hot, it must have been true. He does not remember testifying about that. He has not talked with anybody about this case since that hearing.

Questioned by chairman, the witness testified:

That the men were doing practically steady work because the car was hauled away as fast as it was filled. The cars run on elevated tracks and dump into a bin which is about 200 or 300 feet away; then the truck backs under the bin, a man pulls the lever, and the material goes into the truck. There was a car being filled practically all the time. Every crew had their car; it might take two minutes for it to go down and back. The men take turns going down with the cars and the men who remain behind pick up the stone, which has been thrown to one side, to be put in the crusher. There was no one on the job on August 2nd, except himself, acting as boss.

Questioned by counsel for the insurer, witness stated:

That the gang of workmen were employed by the street department of the town of Danvers, under the head of laborers. The men of this gang, at times, worked very hard; they did not loaf at other times. When his back was turned, he did not know whether the men worked except by knowing how often the cars came down. (Objection to last statement by counsel for claimant.) Mr. McCarthy was a good worker. He does not remember testifying at the previous hearing that no one kills himself when he is doing town work. If he made that statement, it was true. He still thinks that no one kills himself doing town work. He has been a foreman since a year ago last April.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

McSweeney & McSweeney, F. H. Caskin, Jr., and A. Glovsky, all of Salem, for appellee.

De Courcy, J. The employee received a sunstroke while working for the town of Danvers in a sand or gravel pit on August 2, 1917. The Industrial Accident Board awarded him compensation, a decree in accordance with their decision was entered in the superior court, and the insurer appealed. This court, in May, 1918, reversed the decree, and ordered that the case be recommitted to the board " to hear the parties on the question whether the employee was at liberty to stop his work in time to protect himself from injury." McCarthy's Case, 230 Mass. 429, 119 N. E. 697.

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Thereupon the parties submitted expert and other testimony, and after a hearing the board made the following finding:

"That the length of time which elpased between the time when the employee began to get the first symptoms and the time that he collapsed from sunstroke was inappreciable and that he had no opportunity to escape the effects of the personal injury occasioned by reason of his exposure to the heat. While the employee had the same right, or liberty, to leave his employment as any employee has when sickness overtakes him, he had no prior warning of the coming of the attack of sunstroke, was taken unawares, and was overcome thereby, because the heat in the gravel pit was greater than the heat to which an ordinary outdoor worker was exposed on the day of the injury."

[1, 2] This finding was amply warranted by the evidence. It settles in the employee's favor the only question bearing on his right of recovery that was left open on the earlier appeal. On all the evidence the board was warranted in finding that the employee's injury arose out of his employment. The place where he worked was a pit, with banks which attracted the extreme heat and shut off the air, except from the south. The nature of his work required him to remain at it steadily. The Board well might find as a fact that the location and nature of the work peculiarly exposed the employee to the danger of sunstroke; in other words, that the risk of injury by sunstroke was naturally connected with and reasonably incident to his employment, as distinguished from the ordinary risk to which the general public is exposed from climatic conditions per se. McManaman's Case, 224 Mass. 554, 113 N. E. 287; Mooradjian's Case, 229 Mass. 521, 118 N. E. 951; Hallett's Case, 121 N. E. 503, Jan. 13, 1919; Morgan v. Owners of Steamship Zenaida, 2 B. W. C. C. 19; Davies v. Gillespie, 5 B. W. C. C. 64; Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N. W. 708; State ex rel. Rau v. District Court, Ramsey County, 138 Minn. 250, 164 N. W. 916, L. R. A. 1918F, 918; Hernon v. Holahan, 182 App. Div. 126, 169 N. Y. Supp. 705.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

KEANEY'S CASE.

IN RE T. LIBBY & CO.

IN RE TRAVELERS' INS. CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"ARISING OUT OF THE EMPLOYMENT."

Where a delivering teamster left his wagon to collect receipts pertaining to his work, which had been in his hat blown from his head by the wind, and was struck and fatally injured by an automobile, the injury arose "out of his employment," within the Workmen's Compensation Act and acts amendatory thereof.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

*Decision rendered, April 2, 1919. 122 N. E. Rep. 739.

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Appeal from Superior Court, Norfolk County.

Proceedings by Charles F. Keaney, under the Workmen's Compensation Act, for compensation for the death of John Keaney, the employee, opposed by T. Libby & Co., the employer, and the Travelers' Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, its award confirmed by the superior court, and from the decree the insurer appeals. Decree affirmed.

John J. Hayes, of Boston, for claimant.

Walter I. Badger and Louis C. Doyle, both of Boston, for insurer.

PIERCE, J. This is an appeal by the insurer from a decree of the superior court entered in accordance with a finding of the Industrial Accident Board under chapter 751, Acts of 1911, and the acts amendatory thereof.

The evidence submitted to the board member and on review to the Industrial Accident Board warranted the following findings and rulings:

(1) John Keaney, a teamster, while engaged in the performance of his duties on September 5, 1917, received the injuries which caused his death on September 19, 1917. He was driving across Prison Point Bridge, having finished making a delivery, when the wind caused papers which were within his hat to be blown out upon the public highway. Keaney stopped his horses, got down from his wagon for the purpose of collecting the papers (certain receipts pertaining to his work as a teamster), and while so doing was struck and fatally injured by a passing automobile.

(2) The claimant is, and was at the time of his father's injury and death, mentally incapacitated from earning; he is presumed to be wholly dependent for support upon the employee, and is entitled to a weekly compensation of $10 for a period of 400 weeks from September 5, 1917, subject to the provisions of the act.

Conceding that the claimant was totally dependent on the deceased employee, and that the employee was in the course of his employment in leaving the wagon, the insurer contends the injury Keaney received did not arise out of his employment within the meaning of the words as used in the Workmen's Compensation Act, because the action of picking up papers blown from the employee's hat into the street "was not an inevitable and frequent incident of his work," "was not a 'necessary concomitant of the occupation the man is engaged in,'" but "was merely an isolated instance of a danger peculiar to the whole public." In support of its position the insurer quotes from McNichol's Case, 215 Mass. 497, 499, 102 N. E. 697 (L. R. A. 1916A, 306) the negative statement that "it [that is, the phrase 'arising out of his employment'] excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment," and from Cozens-Hardy, M. R., in Sheldon v. Needham, 7 B. W. C. C. 471, that "there must be some special risk incident to that particular employment, a risk which imposes a greater danger upon employee than upon an ordinary member of the public."

The words quoted from the McNicol Case, supra, were not intended in any degree to impair the force and strength of the immediately preceding, affirmative, explicit assertion that "if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment." The definition of the phrase arising out of the employment in McNicol's Case, supra, decides that the injury grows out of the employment if in fact there was a causal relation between the employment and the injury which was not so remote as to

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preclude a legitimate inference that the risk which resulted in the injury was incidental to the character of the employment, or to the conditions of the employment which exposed the workman to the injury. Sundine's Case, 218 Mass. 1, 105 N. E. 433, Reithel's Case, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304, Stacy's Case, 225 Mass. 174, 114 N. E. 206, Hallett's Case, 121 N. E. 503, Cranney's Case, 122 N. E. 266, Harbroe's Case, 223 Mass. 139, 111 N. E. 709.

Hewitt's Case, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917 B, 249, Moore's Case, 225 Mass. 258, 114 N. E. 204, and Donahue's Case, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215, are cases where the causative relation between injury and employment was two remote to charge the employment with the risk of the particular injury received; while the injury received in Reithel's Case, supra, flowed from the employment "as a rational consequence."

In the case at bar the employment of Kearney to drive a team through the public streets and deliver goods required of him every reasonable and lawful effort to accomplish his task. His work did not require him to stay on his wagon. He was bound in the performance of his duty to use the street to deliver goods, to regain packages or papers fallen from the wagon, as also to care for his horses, adjust the harness and repair the wagon, if necessary. It is manifest he might be injured while in the street in the performance of duty, and it is plain his employment therein exposed him to the particular injury he received.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

O'FLYNN'S CASE.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPENDENCY OF HALF BROTHER—PAYMENTS THROUGH MOTHER.

Dependency of half-brother on earnings of deceased employee, within Workmen's Compensation Act, could not be ruled adversely to him because the contributions were not made directly to him but were paid to his mother, decedent's stepmother.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTENT OF DEPENDENCY—QUESTION OF FACT.

The extent of the dependency of claimant under the Workmen's Compensation Act for the death of his half-brother was for the Industrial Accident Board to decide as a question of fact, and if there was any evidence to suport the board's finding, the Supreme Judicial Court cannot disturb it.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTENT OF DEPENDENCY—EVIDENCE.

Evidence *held* to support findings of Industrial Accident Board that earnings of decedent's stepmother, were sufficient merely for her own

* Decision rendered, April 14, 1919. 122 N. E. Rep. 767.

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support, that decedent felt under obligation to support claimant, a half-brother and that certain monthly payments were made for such half-brother's support.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under the Workmen's Compensation Act for the death of Thomas O'Flynn, deceased, by Mary O'Flynn and Bernard O'Flynn, opposed by the New England Bakery Company, the employer, and the Travelers' Insurance Company, the insurer. Compensation was awarded Bernard O'Flynn, the award confirmed by the superior court, and from its decree the insurer appeals. Decree affirmed.

Walter I. Badger and Louis C. Doyle, both of Boston, for appellant.
Flynn & Mahoney, of Providence, R. I., for appellee.

CARROLL, J. Thomas O'Flynn, the employee, received a fatal injury arising out of an in the course of his employment. His stepmother, Mary O'Flynn, claimed compensation, as did her son Bernard O'Flynn, fourteen years of age, a half-brother of the deceased, who lived with his mother.

The Industrial Accident Board found that Mrs. O'Flynn was not entitled to compensation, and refused the insurer's request that Bernard O'Flynn was not entitled to compensation because "There was no contributions directly to his support and he not a dependent merely because he may indirectly have benefited by payments or contributions made to his mother" and awarded him compensation of $3.07 a week under the terms of the Workmen's Compensation Act (St. 1911, c. 751).

[1] The board was right in refusing the request that Bernard was not entitled to compensation. His dependency upon the earnings of his brother Thomas was a question of fact to be determined upon all the evidence. Because the contributions were not made directly to Bernard, but were paid to the mother, did not deprive him of his right to rely on these contributions; and he was a dependent within the meaning of the Workman's Compensation Act, although the payments were not made directly to him, but were paid to another for his benefit.

The insurer also insists that the board was wrong in deciding that Bernard was entitled to compensation to the amount of $3.07 a week. Bernard and his mother lived in Providence, Rhode Island. There were no other members of the household. The mother earned on an average eight dollars a week and the deceased employee contributed an average of twenty dollars a month, which with the amount earned by Mrs. O'Flynn, was used in the support of the family. The board based its findings on the fact that $240 each year was contributed for the support of Bernard from the yearly earnings of $780 of Thomas O'Flynn, and awarded compensation accordingly. The insurer contends that the monthly payments of twenty dollars were placed in a common fund and were used for the support of both the mother and Bernard, that the compensation should be based accordingly upon an annual contribution of $120 instead of $240, making the compensation payable to Bernard $1.54 a week.

[2] The extent of the dependentcy of the claimant was for the board to decide as a question of fact, and if there was any evidence to support its finding, we cannot disturb it. All the money contributed by Thomas, as well as the earnings of Mrs. O'Flynn, were used for the support of herself and Bernard. She was self-supporting and could have cared for herself without assistance if she did not have the care of Bernard. It was found that in giving the money to the mother, the employee intended that it should be used for the support of his brother, as he "regarded himself as morally obligated to help in Bernard's support."

[3] There was evidence from which it might be fairly inferred that

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the earnings of Mrs. O'Flynn were sufficient merely for her own support, that the deceased employee felt that he was under a moral obligation to support his brother and that the monthly payments were paid for the brother's support. We cannot say there was no evidence to support these findings of the board.

Decree affirmed.

SUPREME COURT OF MINNESOTA.

MARKLEY

v.

CITY OF ST. PAUL. (No. 21197.)*

MASTER AND SERVANT—COMPENSATION FOR INJURED FIREMAN—WORKMEN'S COMPENSATION ACT—REPEAL OF FORMER REMEDY.

The Workmen's Compensation Act does not repeal by implication section 52 of the Charter of the City of St. Paul, providing compensation for a fireman injured in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

Appeal from District Court, Ramsey County; Hugo O. Hanft, Judge.

Action by John J. Markley against the City of St. Paul. From a judgment for plaintiff on refusal of defendant to plead after overruling of general demurrer, defendant appeals. Affirmed.

O. H. O'Neal and James D. Swan, both of St. Paul, for appellant.

Tom J McGrath, of St. Paul, for respondent.

QUINN, J. Plaintiff, a fireman employed by the city of St. Paul, while so engaged, was, on October 4, 1917, injured and rendered incapable of performing his duties, and remained so incapacitated to the time of the bringing of this action. The city paid a sum equal to his monthly wage from the time of his injury to February, 1918, and refused to make further payments, claiming that the amount which he was entitled to receive should be determined under the Workmen's Compensation Act (Gen. St. 1913, c. 84A). It is contended on behalf of the plaintiff that he is entitled to full pay for the first six months of his incapacity, under the city charter, and accordingly he brought this action to recover the amount of his salary for February, 1918. Defendant interposed a general demurrer to the complaint, which was overruled. Defendant did not answer, and the plaintiff took judgment for the amount demanded. Defendant appealed from the judgment.

The city charter was adopted by the voters of St. Paul as a home rule charter in May, 1912, section 52 of which is as follows:

"Section 52. All firemen or police officers injured in actual service and thereby rendered incapable of performing his duty, shall receive full pay during the period of incapacity not exceeding six months, and if incapacitated for a further period, one-half pay, not exceeding an additional period of six months. Such injured fireman or police officer shall

* Decision rendered, May 9, 1919. 172 N. W. Rep. 215. Syllabus by the Court.

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be entitled to reinstatement at any time within eighteen months from the date of injury or incapacity, if physically capable of resuming his duties."

The Workmen's Compensation Act was subsequently enacted and took effect October 1, 1913. The only question presented is whether this statute repealed section 52 of the charter. If the plaintiff is entitled to receive compensation for his injury under the charter, then the judgment is correct; otherwise not.

That a member of a fire department is an employee within the meaning of the Workmen's Compensation Act was settled in State ex rel. City of Duluth v. Dist. Court, 134 Minn. 28, 158 N. W. 791, Ann. Cas. 1918B, 635. We are of the opinion that section 52 of the charter remains in force, notwithstanding the Compensation Act passed subsequently thereto.

Our Constitution as amended in 1898 authorizes cities to frame their own charters which must be consistent with and subject to the laws of the state. Section 36, art. 4. The statute enacted to make the foregoing constitutional amendment operative and under the charter in question was amended in section 1345, G. S. 1913, which provides in part as follows:

"Subject to the limitations in this chapter provided, it [the charter] may provide for any scheme of municipal government not inconsistent with the Constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of local municipal functions as fully as the Legislature might have done before the adoption of sec. 33, art. 4, of the Constitution."

The power thus given embraces any subject appropriate to the orderly conduct of muncipal affairs. State v. O'Connor, 81 Minn. 79, 83, N. W. 498; State v. District Court, 90 Minn. 457, 97 N. W. 132; State v. District Court, 87 Minn. 146, 91 N. W. 300; Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133; State v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L. R. A. (N. S.) 1127; Park v. City of Duluth, 134 Minn. 296, 159 N. W. 627; Schigley v. Waseca, 106 Minn. 94, 118 N. W. 259, 19 L. R. A. (N. S.) 689, 16 Ann. Cas. 169; Hjelm v. City of St. Cloud, 129 Minn. 240, 152 N. W. 408.

The theory of the Compensation Act includes the idea that the wage-earner ought not to be required to bear the whole result of a personal injury arising out of and in the course of his employment, and that the community ought to share in the loss. The carrying of this theory into practical effect, the subject of which is one of public policy, must necessarily be committed to the Legislature for government control. But such provision will not prevent a city operating under a home rule charter from providing additional compensation to a fireman injured in the course of his employment. Nor is a charter so providing inconsitsent with the object of the Compensation Act. It follows that section 52 of the charter in question was not repealed, but remains in force. If the city wishes to avoid the provisions of the same it must do so by a repeal of the section in question by proper authority.

Affirmed.

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SUPREME COURT OF MINNESOTA.

STATE EX REL. NIESSEN ET AL.

v.

DISTRICT COURT OF RAMSEY COUNTY ET. AL. (No. 21268.)*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—FINDINGS OF TRIAL COURT—CERTIORARI.

The findings of fact made by the trial court in proceedings under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8220) are not conclusive, but will be reviewed on certiorari to the extent of determining whether they are supported by sufficient competent evidence.

(For other cases, see Master and servant, Dec. Dig. § 412.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—FINDINGS OF TRIAL COURT—REVIEW.

The question presented on such review is one of law, and in the decision thereof the court will be guided by the general rule that a question of law arises on the evidence where an impartial consideration therof, together with permissible inferences from facts shown, will lead reasonable minds to but one conclusion.

(For other cases, see Master and servant, Dec. Dig. § 412.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—FINDINGS OF TRIAL COURT—REVIEW.

If reasonable minds may reach different conclusions, the question of the sufficiency of the evidence becomes one of fact, and the findings of the trial court thereon will be sustained.

(For other cases, see Master and servant, Dec. Dig. § 412.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY IN PERSONAL EMPLOYMENT—EVIDENCE.

Findings of the trial court that decedent met his death when not engaged in the course of his employment, and at a time when he was engaged in furthering personal interests, *held,* applying the rule stated, sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari from District Court, Ramsey County; James C. Michael, Judge.

Certiorari by the State of Minnesota, on relation of Marie Niessen and others, against the District Court of Ramsey County, to review its judgment denying relief in proceedings under the Workmen's Compensation Act against R. H. Merriam & Co., a copartnership, for the death of Harold J. Niessen. Affirmed.

E. A. Waters, of St. Paul, for appellant.
F. M. Catlin, of St. Paul, for respondent.

BROWN, C. J. Certiorari to review a judgment of the district court of Ramsey county denying relief in proceedings under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230.)

* Decision rendered, May 2, 1919. 172 N. W. Rep. 133. Syllabus by the Court.

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It appears from the record that for some time prior to his death Harold J. Niessen was in the employ of R. H. Merriam & Co., a copartnership doing business in the city of St. Paul, as a traveling salesman at a fixed compensation per month. He was assigned to a particular territory, which he covered sometimes by train and sometimes by automobile. He owned an automobile, and when he used it in his employment the company allowed him $25 per week for the expense of operation. At about 8 o'clock p. m. on May 28, 1918, near the village of Kilkenny, while traveling with his automobile from Waterville to St. Paul, his place of residence, he met with an accident and was killed by the overturning of the machine; the cause of the accident does not appear. He left surviving as partial dependents his mother, a sister, and brother, in whose behalf the mother brought this proceeding under the Workmen's Compensation Act. The trial court rejected the claim for compensation and as a basis for that conclusion found as facts:

"That on May 27 and 28, 1918, deceased was engaged regularly in the line of his employment, up to the time he completed his work at Waterville in the afternoon of May 28, 1918, whereupon deceased, in the evening of May 28th, departed from Waterville to return to St. Paul by way of Montgomery in violation of instructions of his employers and upon an errand wholly personal to himself, and in so doing met with said accident which resulted in his death. That at the time and place of said accident the deceased was not in the course of his said employment or in the line of his duties as an employee of defendants, and his said accident and death did not arise out of or in the course of his said employment."

[1-3] The only question presented to this court is whether the findings embraced within the quotation are sustained by the evidence. The question must be answered and disposed of as a question of law, and not of fact or mixed law and fact; for, as urged by counsel for respondent, review in this court in such proceedings is so limited by the express terms of the compensation act. Section 8225, G. S. 1913. A similar limitation is found in the compensation acts of other states, and the rule stated is generally applied, though some of the courts hold that the findings of the trial court, or of the industrial commission which administers the law in some jurisdictions, are conclusive upon all questions of fact. 1 Honnold on Workman's Compensation, 242, where a collection of the authorities may be found. See, also, L. R. A. 1916A, at page 266. The findings are not regarded as conclusive in this state, for we here review them for the purpose of determining whether they are supported by sufficient competent evidence. In this we apply the rule that a question of law arises on the evidence in a particular case where an impartial consideration thereof, together with all reasonable and fair inferences, will lead reasonable minds to but one conclusion. That is a well-established rule and one of general application by the courts. 3 Dunnell's Dig. 9707; 38 Cyc. 1514 et seq. If reasonable minds may reach different conclusions, the question becomes one of fact, and, where that situation is presented in a compensation case, the findings must be sustained. We have not heretofore enlarged upon the particular point in compensation cases where the evidences has been challenged as insufficient to sustain the findings of the trial court, but expressions in former opinions, in whatever language couched, were not intended as laying down a broader scope of inquiry by this court. State ex rel. v. District Court, 128 Minn. 221, 150 N. W. 623; State ex rel. v. District Court, 129 Minn. 423, 152 N. W. 838; State ex rel. v. District Court, 132 Minn. 251, 156 N. W. 278; State ex rel. v. Dist. Ct. of Ramsey County, 132 Minn. 249, 156 N. W. 120; State ex rel. v. District Court, 133 Minn. 439, 158 N. W. 700. The statement found in State ex rel. v. District Court, 137 Minn. 435, 163 N. W. 755, L. R. A. 1917F, 1094, to the effect that to justify setting the findings aside it must appear that they are manifestly against the preponderance of the evidence, was an inaccurate expression of the rule guiding the court in such

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cases, for to weigh the evidence and declare the preponderance thereof is to determine a question of fact, and not a question of law. 28 Cyc. 1516. With this statement we pass this feature of the case, and come to the question whether, within the rule stated, there is any evidence reasonably tending to support the findings in this case.

[4] The teritory covered by Niessen in his employment was in Southern Minnesota, and was comprised of certain towns specially designated by the employer. The evidence tends to show that he had no roving commission to go out and seek business for the company, but was required to make such towns only as were assigned to him from week to week. His itinerary or schedule of towns for the week in which he met his death took him from St. Paul to Shakopee, thence to Carver, Belle Plaine, St. Peter, Kasota, Waterville, Waseca, Morristown, and Farmington. He had made most all those towns and had reached Waterville on the day of his death; the remaining towns of his schedule being Waseca, Morristown, and Farmington. The evidence further tends to show that at Waterville, late in the afternoon of the 28th of May, the day of his death, he concluded to return to St. Paul by way of Montgomery, Le Sueur Center, and New Prague for the memorial exercises to take place on the 30th; going out the next day, Friday, to make the remaining towns of Waseca, Morristown, and Farmington. The route selected for the return took him directly away from those towns, and through and into towns he was not required to make, and so far as appears in which the company had no fixed trade; at least, deceased was not required to make them in his rounds. It was after starting out for the return trip to St. Paul, leaving the towns named unattended to, that he met his accidental death.

There was no direct controversy in the evidence, though some thereof is challenged by counsel for relator as untrue. But the thruthfulness of the witness is not one for this court, but solely for the trial judge. The only question therefore is whether the findings of the court to the effect that deceased met his death after he had departed from the course of his employment on an errand personal to hmself are not sustained by the evidence as a matter of law. A careful consideration of the record leads to the conclusion that the finidngs must be sustained. Whether our conclusion would concur with that of the trial court were the question before us as one of fact, to be determined by a consideration of all the evidence, together with the situation of the parties and the character of the employment and permissible inferences to be drawn from the evidence, we do not stop to consider, though it may be remarked that in the light of some of our decisions the question is not entirely free from doubt. State ex rel. v. District Court, 129 Minn. 176, 151 N. W. 912. But considered from the viewpoint of the legal sufficiency of the evidence, a different question is presented upon which we can reach no conclusion other than that stated. State ex rel. v. District Court, 138 Minn. 326, 164 N. W. 1012, L. R. A. 1918F, 881.

Judgment affirmed.

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SUPREME COURT OF NEBRASKA.

MYERS

v.

ARMOUR & CO. (No. 20941.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—COMMUTATION OF PAYMENTS—AGREEMENT OF PARTIES.

Under the Workmen's Compensation Act, commutation and payment in a lump sum by order of the district court are authorized only in the exercise of a sound discretion upon an agreement or a settlement by the parties.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from District Court, Douglas County; Troup, Judge.

Proceedings under the Workmen's Compensation Act by Elsie Myers, administratrix of the estate of Joseph J. Myers, deceased, for compensation for his death, opposed by Armour & Co. From a judgment allowing an award but refusing commutation and payment in a lump sum, administratrix appeals. Affirmed.

A. H. Murdock, of Omaha, for appellant.

Kennedy, Holland, De Lacey & Horan, of Omaha, for appellee.

ROSE, J. This is a proceeding under the Workmen's Compensation Act. While Joseph J. Myers was performing his duties as an employee of Armour & Co. in a packing house in Omaha September 4, 1918, a boiler exploded and fatally injured him; death ensuing a day later. He left surviving him his widow, Elizabeth Myers, age 26, and a daughter 2 years old. The widow was appointed administratrix of his estate. As, such, she instituted this proceeding before the compensation commissioner and applied for an order commuting the statutory compensation and requiring payment in a lump sum. The application was overruled, and the executrix appealed to the district court, where a judgment was rendered in her favor for the payment of $12 a week for 350 weeks and for funeral expenses in the sum of $100; but the application for a commutation and payment in a lump sum, being resisted by the employer, was overruled on the ground that such relief could not be granted without the consent of both parties. It is from this judgment that the executrix has appealed.

The employer concedes that the widow, for the benefit of herself and child, is entitled to $12 a week for 350 weeks and to $100 for funeral expenses. The only question presented is the authority of the district court, under the Workmen's Compensation Act, to order commutation and payment in a lump sum. The answer to the question depends on the meaning of the language used by the Legislature. The Workmen's Compensation Act provides:

"The amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court; provided,

* Decision rendered, April 4, 1919. 172 N. W. Rep. 45. Syllabus by the Court.

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that where commutation is agreed upon, or ordered by the court, the lump sum to be paid shall be fixed at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests. Upon paying such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record.

"Whenever an injured employee or his dependents and the employer agree that the amounts of compensation due in periodic payments for death, permanent disability, or claimed permanent disability, under this article, shall be commuted to one or more lump payments, such settlement or agreement therefor, shall be submitted to the district court in the following manner:

"An application for the approval of such settlement, signed by both parties, shall be filed with the clerk of the district court, and shall be entitled the same as an action by such employee or dependents against such employer; or shall contain a concise statement of the terms of the settlement sought to be approved, together with a brief statement of the fact concerning the injury, the nature thereof, the wages received by the injured employee prior thereto, and the nature of the employment. The judge of the district court, immediately, or within one week after the filing of said application, unless there be good cause for continuance, at chambers or in open court and in or out of term time, shall hold a hearing on said application, and proof may be adduced, witnesses subpœnaed and examined, the same as in an action in equity. If, after such inquiry, the court finds said settlement fair, just, and for the best interests of said employee or his dependents under all the circumstances, he shall make an order approving the same. If such agreement or settlement be not approved the court may dismiss said application at the cost of the employer or continue the hearing, in the discretion of the court."

Laws 1917, c. 85, § 131.

This legislation was enacted to protect the dependents of employees. The regular method of exacting compensation is the requiring of periodical payments for a definite period. The system does not contemplate payments in large sums to dependents who may be improvident. The law was not framed to defeat the legislative aims. To prevent dependents from dissipating or losing their means of support, payments at stated times are required for definite periods an unnecessary construction which would defeat the intention of the lawmakers should be avoided. Payment in a lump sum is a departure from the general rule. When this method is followed, the authority for such a course should be found in the language relating to the exception. In the light of all of the legislation on this subject, the discretion of the district court in passing on applications for commutation seems to be invoked only where both parties have agreed to such a course. This construction is not refuted by the exception in the following provision:

"The amount of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court."

The latter clause, in connection with the entire act, does not necessarily mean that the district court, in absence of an agreement for commutation, may order payment in a lump sum to compensate a dependent for the death or for the permanent disability of the employee. Other provisions have a different import.

In the district court the procedure for commutation and payment in a lump sum in case of death or of permanent disability applies alone to

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agreements or settlements. A method of procedure in absence of a mutual understanding of the parties is not found in the statute. In overruling the application the trial court correctly interpreted the law.

Affirmed.

Cornish, J., not sitting.

SUPREME COURT OF NEBRASKA.

THOMAS
v.
OTIS ELEVATOR CO. ET AL. (No. 20387.)*

1. MASTER AND SERVANT—COMPENSATION ACT—INJURIES TO SERVANT BY ACT OF THIRD PARTY—RIGHT TO ENFORCE SUBROGATION.

Section 3659, Rev. St. 1913, is for the benefit of an employer, who has paid or is liable to pay compensation under the act to an injured workman. If the workman, who is injured by the negligence of a third party, obtains an assignment from his employer of his right to bring the action, it may be maintained directly by the injured workman against the negligent third party.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from District Court, Douglas County; Leslie, Judge.

Action by Daniel M. Thomas against the Otis Elevator Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Gurley, Fitch, West & Hickman, of Omaha, for appellants.

J. C. Travis and John O. Yeiser, both of Omaha, for appellee.

LETTON, J. This is an action to recover damages for personal injuries, brought against the Otis Elevator Company and one Blackwell, one of its employees. Plaintiff recovered a judgment for $25,000 and defendants appeal.

Selden-Breck Company, builders, were erecting a hotel building in Omaha under a contract. Part of the work was sublet to a number of other concerns. The Otis Elevator Company, defendant, had a subcontract to install two elevators in the building, and the Omaha Iron Works had a subcontract to erect and furnish certain doors and metal work for the elevator shaft.

The plaintiff was a workman employed by the latter. On the morning of the accident, plaintiff who had been directed by his foreman the night before to clean up certain dirt and debris from the runway of the elevator door upon the fifth floor of the building, was engaged in this duty; part of his body projecting into the elevator shaft. The foreman of defendant elevator company and Blackwell were working upon an elevator in another elevator shaft across the hall, when some one called up that shaft to one of them, telling him the foreman, or superintendent, wanted to speak to him. The two men left the elevator upon which they were working, went to the south shaft, got into the elevator,

* Decision rendered, April 4, 1919. 172 N. W. Rep. 53. Syllabus by the Court.

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which was standing there, and, without giving any notice or warning, started the elevator downward. It struck the plaintiff at the next floor, and he fell five stories to the basement. The fall caused compound fracture of both legs, broke one arm, fractured his jaw, dislocated a number of his teeth, and otherwise severely sprained, bruised, and injured him. His injuries required a number of surgical operations, which resulted in shortening one leg about 1½ inches more than the other one, which was also shortened. He suffered severe pain and agony, his knee was stiffened, and he is a cripple for life. He was a young man about 26 years of age, at that time, of strong physique, and was earning at the time of the accident from $85 to $90 and upwards per month, excluding overtime, and his expectancy of life was 37.14 years.

The particular grounds of negligence alleged in the petition are substantially that the work to be performed by the Elevator Company and the Iron Works was of such a character that it conflicted, and rendered the south shaft dangerous for the employees of both companies, if they were permitted to work in and about the shaft at the same time; that "said south elevator shaft was turned over to the Omaha General Iron Works, and that instructions were issued to these defendants that said south shaft was not to be used by them, nor was the elevator to be operated during working hours, until the completion of the work to be performed in the shaft by the Omaha General Iron Works"; that said work "was not in fact completed, and said Otis Elevator Company well knew, or ought to have known"; that the defendants, without notice of warning, or taking any precautions, and with full knowledge of the plaintiff's employment, and in breach of the instructions issued that they were not to operate said car in said south shaft during working hours, carelessly and negligently, lowered the elevator in said south shaft from the sixth floor downward, striking plaintiff, etc.

In its answer defendant Otis Elevator Company denies generally most of the allegations of the petition, and denies that the plaintiff, while working for the Iron Works, sustained accidental injuries. It also pleads that under the Employers' Liability Act, where a third person is liable to the employee for injury, the employer shall be subrogated to his right against such third person, and that by reason thereof the plaintiff assigned his cause of action, if any, against said defendant to his employer, and is not a proper party to institute this action.

The reply alleges that the action was brought with the approval and under the direction of the Iron Works. It is further alleged that plaintiff had filed a petition in the district court, alleging the fact of the accident; that the Iron Works had directed him to prosecute it in his own name; that the Iron Works admitted its liability to plaintiff for compensation, and its willingness to assign its right of action against the Elevator Company, if approved by the court; and that the court authorized plaintiff to continue the prosection of this action and apply the proceeds, first, to the satisfaction of any claim plaintiff might have against the Iron Works for compensation, as provided by the agreement.

There is little dispute as to the facts, except perhaps with respect to whether there were instructions given by the general contractor to the defendant Elevator Company not to operate the car in the south shaft.

[1] The first complaint made is, that the plaintiff had no right to bring the action in his own name under section 3659, Rev. St. 1913. In Muncaster v. Graham Ice Cream Co. (No. 20421) 103 Neb. ——, 172 N. W. 52, it was decided that the statute did not take away the right of the employee to recover damages against a third person when the relation of master and servant does not exist; that the section was designed for the protection of an employer who had paid the compensation; that, if the employer's rights were protected, it was no concern of the negligent third party.

Furthermore, there was an agreement between the plaintiff and his

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employer with respect to the bringing of this action, which was approved by the district court. Defendants under these circumstances suffered no prejudice and cannot complain.

[2] The next complaint is that the instructions failed to reflect the issues presented by the pleadings. It is insisted that the trial court, by instruction No. 3, submitted the case on the theory that if defendants knew, or in the exercise of ordinary care could have known, the plaintiff's position, it was the duty of the conductor in charge to give plaintiff some reasonable warning of his intention to cause the elevator to descend. As we read the petition, this ground of negligence was alleged, as well as others, and it was not error for the court to so instruct the jury.

[3] It is also complained that the court erred in saying in that instruction:

"It is admitted or established in this case that the work being performed by the plaintiff made it necessary or proper for him to be about or in the elevator shaft known as the south shaft."

It is said this part of the instruction was highly prejudicial to the defendants. It may be highly prejudicial, but there is no doubt that the statement of fact is correct. It was not disputed that the plaintiff had been ordered to clean up the runway or the doors, and that the position he assumed was proper for that purpose. This being the case, the court was justified in stating this to the jury. It is also complained that the evidence fails to show that the instructions as to not using the shaft were heard or understood by defendants. There is evidence that the superintendent of the Selden-Breck Company, while Blackwell was running the elevator a few days before, ordered it stopped during working hours for the reason that the use of the shaft was necessary for the iron workers to complete their work, and that the foreman of the defendant Elevator Company was present. The fact the use of the elevator was accordingly stopped is strong evidence that the foreman heard these instructions, and knew that the shaft was in use by the iron workers. It is immaterial whether or not defendant's foreman made an express agreement with the Iron Works. If he knew that the iron workers were using the shaft, and had been directed not to use the elevator, this was sufficient.

It is common knowledge that co-contractors, in working upon a building in process of erection, must take notice of facts and circumstances which demand that control of a particular part of the building for a limited time must be exercised by one or the other in order to avoid injuries to other workmen.

Considering all the testimony in the case, we are convinced that it supports the allegations of negligence, and that such negligence was the approximate cause of plaintiff's injury.

[4] The verdict was for $25,000. It is strongly urged that "this verdict is exorbitant"; that the amount invested at 6 per cent. would bring an amount largely in excess of plaintiff's normal income. In the beginning of this opinion we stated plaintiff's physical condition. It clearly appears that, from being an active, strong and healthy young man, he has been made a deformed and helpless cripple for life. In addition to this the evidence is clear and positive as to the prolonged and excessive pain and agony which he endured while in the hospital and since. We belive the amount of the verdict is not excessive.

After the trial affidavits from two of the jurors were filed to the effect that the verdict was what is known as a quotient verdict. This evidence is not satisfactory. These affidavits were not made or filed until about three months after the trial. Furthermore, they do not show the jury had previously agreed to be bound by the result. Since the affidavits were not filed until the day the motion for a new trial was passed upon, there was no opportunity to obtain counter affidavits. The practice of atacking verdicts by the affidavits of part of the jurors long after the

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trial is not to be encouraged or commenced. The verdict will not be set aside merely upon such indefinite and uncertain affidavits.

The judgment of the district court is affirmed.

Cornish and Rose, JJ., not sitting.

SUPREME COURT OF NEW JERSEY.

KENNEDY

v.

COON.*

2. COURTS — FEDERAL DECISIONS — EXCLUSIVE FEDERAL JURISDICTION.

In workmen's compensation case for death of employee on towboat carrying interstate commerce, the question of whether the case is within exclusive jurisdiction of federal courts is controlled by federal decisions.

(For other cases, see Courts, Dec. Dig. § 97[5].)

Certiorari to Court of Common Pleas, Union County.

Proceedings under the Workmen's Compensation Act by Rebecca Coon for compensation for death of her husband, Robert Coon, opposed by James Kennedy, trading as Kennedy's Towing Line. Judgment for petitioner, and the employer brings certiorari. Reversed.

Judgment affirmed 103 Atl. 207.

Argued before Swayze, Minturn, and Kalisch, JJ.

Kalisch & Kalisch, of Newark, for prosecutor.

McDermott & Enright, of Jersey City, for respondent.

MINTURN, J. The writ of certiorari brings up the proceedings in a workmen's compensation case in the Union County common pleas, wherein judgment was rendered for petitioner, whose husband lost his life by an accident, as the trial court found, arising out of and in the course of his employment with prosecutor.

The prosecutor is in the towboat business, and is engaged in interstate commerce between New York and New Jersey. He resides in Elizabeth, where he has his office and principal place of business. One of his steam tugs, the Elsie K., was registered in the customs office in Newark pursuant to 7 R. S. U. S. Fed. Stat. Ann. 16, § 4141 (U. S. Comp. St. § 7719.)

Robert Coon, petitioner's husband, had been employed as fireman on the boat, and was drowned when she foundered while on a voyage from Brooklyn to Elizabeth August 4, 1915. She went down within about 500 feet of New Jersey shore at Constable Hook. The court below found as a fact, and there was evidence to support it, that the tug sank in New Jersey waters, and that the deceased was drowned within the jurisdiction.

* Decisions rendered, Oct. 16, 1917. 106 Atl. Rep. 210.

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Since this case was submitted, two causes involving questions of the same general legal import have been decided by the federal Supreme Court. The case of the Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, involved the inquiry whether the the Workmen's Compensation Act of New York was in conflict with article 3, § 2, of the federal Constitution, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and article 1, § 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the federal government, and United States Judicial Code, §§ 24 and 256 (Act Cong. March 3, 1911, c. 231, 36 Stat. 1091, 1160 [U. S. Comp. St. §§ 991, 1233]), giving federal District Courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, as well as with the general policy of Congress to encourage investments in ships, manifested by various congressional enactments imposing a limitation of liability upon the owners of vessel property.

The majority opinion of a divided court held that such conflict of legislative authority existed, and that the New York act was consequently invalid so far as it attempted to impose liability upon the owner of an ocean-going steamship plying between New York City and the city of Galveston, Tex., for an injury resulting in the death of a longshoreman killed while at work upon the vessel.

This determination would obviously be dispositive of the claim in the case sub judice, since the fact is conceded that the boat upon which this decedent was employed was engaged in interstate commerce between the port of Brooklyn, and the state of New York, and Elizabeth, in this state. But the Southern Pacific Case was followed at the same term of the federal court by Valley Steamship Co. v. Wattawa, and the same company against Mraz, reported in 244 U. S. 202, 37 Sup. Ct. 523, 61 L. Ed. 1084. This later adjudication imposes a practical qualification or limitation upon the general application in practice of the rule declared by the former adjudications to the effect that the claim of exclusive federal jurisdiction will not be recognized as a basis for a writ of error, unless the question shall have been raised in the trial court, and is presented as a basis of appeal, where the state appellate tribunal is circumscribed in its discussion of the case to errors appearing on the record, citing in support of this general rule of practice Mutual Life Insurance Co. v. McCrew, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33.

[1] The general rule of practice in this state relative to matters determinable in this court, and in the Court of Errors and Appeals, has been settled in accordance with the rule promulgated by the federal Supreme Court, with the additional qualification that the rule shall not apply where, as in this case, the question presented is one dealing with the jurisdiction of the court, or the general public policy of the state. State v. Shupe, 88 N. J. Law, 610, 97 Atl. 271.

[2] Obviously, therefore, the question of jurisdiction is involved in this controversy in view of the federal decisions to which we have referred, and under our practice is not eliminated by the failure of the record to present it. The result is that, in reaching a result, our determination must be controlled by the federal decisions referred to, which leads to a reversal of the judgment under review.

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SUPREME COURT OF NEW JERSEY.

LUNDY

v.

GEORGE BROWN & CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACT—EVIDENCE.

Compensation for the death of a servant should not be allowed unless the testimony or circumstances adduced fairly give rise to a reasonable inference that death was attributable to the injuries he received.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CAUSE OF DEATH—EVIDENCE.

In a proceeding under a Workmen's Compensation Act for the death of a servant, it was not essential to the right of recovery that petitioner should establish that the injuries were the proximate cause of death; it being sufficient that they were the producing cause.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—CAUSE OF DEATH—EVIDENCE.

In proceeding under Workmen's Compensation Act to obtain compensation for death of a servant, evidence *held* to sustain finding that death on February 21, 1918, was caused by injuries received on December 19, 1916, and that peitioner was entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Court of Common Pleas, Essex County.

Proceeding under the Workmen's Compensation Act (P. L. 1911, p. 134, as amended by P. L. 1913, p. 309), by Mary Lundy to obtain compensation for the death of Patrick Lundy, her husband, opposed by George Brown & Co., employer. There was an award in favor of petitioner, and the employer brings certiorari. Affirmed.

Argued November term, 1918, before Bergen, Kalisch, and Black, JJ.

M. Casewell Heine, of Newark, for prosecutor.
Edward M. & Runyon Colie, of Newark, for defendant.

KALISCH, J. The single question presented here is whether there was any evidence in the case on review justifying the court below to make a finding that the death of petitioner's decedent was the result of injuries received by him in an accident admitted to have arisen out of and in the course of his employment.

The prosecutor's contention is that there was no such evidence.

The petitioner's husband was injured on December 19, 1916. He died on February 21, 1918, about 14 months after the accident. On December 18, 1917, Patrick Lundy, the petitioner's decedent, had filed his petition for compensation to which the prosecutor, on February 6, 1918, filed its answer. Before the day set for the hearing, Lundy died. On May 15,

* Decision rendered, March 18, 1919. 106 Atl. Rep. 362.

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1918, Mary Lundy, his widow, filed her petition setting forth that the estate of Patrick Lundy was entitled to compensation from September 17, 1917, to February 21, 1918, the date of his death for his disability during that period as the result of said accident. The petitioner further prayed for compensation for the death of her husband as a result of the accident, according to the fixed schedule of compensatoin in such cases, and for an allowance of $100 for funeral expenses. To this petition the prosecutor filed its answer, on May 15, 1918, in which it denied that the death of petitioner's decedent was caused by an accident arising out of and in the course of his employment. Subsequently by consent in writing of the prosecutor's attorney, an order was entered that the petitioner be admitted as a party petitioner; she having been appointed administratrix of the estate of her husband on August 5, 1918.

The prosecutor's sole contention in the court below was, and now reiterated here is, as follows:

"Mr. Heine: My contention is that the death was due to a rheumatic cardiac disease, which had a secondary or contributing cause in rheumatism. That the cause of death was from a disease in no way connected with the traumatism received as a result in any way from the accident. That is the question, whether the death resulted in any way from the accident."

On that branch of the inquiry, the court below found that as a result of the accident the petitioner's decedent "sustained serious injuries, among other things a fracture of most of the ribs on the left side of his body, and that as the result of said injuries received in said accident he died on February 21, 1918."

It is this finding which counsel of prosecutor contends is not supported by any evidence.

[1] Of course, if the testimony or circumstances adduced do not fairly give rise to a reasonable inference that the death of the decedent was attributable to the injuries he received in the accident, then the award made by the court below on that finding must be reversed.

[2] We think there was evidence which f ly justified the finding of the court below on the mooted inquiry. It is true that the medical testimony in the case is in sharp conflict on the question whether the decedent died as a result of his injuries, or from an entirely independent cause. It is not at all surprising to find opinions of medical experts, on the opposite sides of a case, in disagreement on the matter. It was not essential to the petitioner's right to a recovery that she should have established that the fractured ribs were the proximate cause of death. If the injuries were the producing cause, the proof of that fact is sufficient.

[3] On behalf of the petitioner, it was shown that her husband, up to the time of the accident, was a strong healthy, man; that by the accident nearly all his ribs on his left side were fractured; that, though the injured ribs united, the deceased never recovered from the effects of his injury; he became broken down in his general health and went into a steady decline. From December 19, 1916, the date of his injury, until September 17, 1917, he gradually grew weaker, but, at that time, owing to the refusal of further payment to him by the prosecutor, for temporary disability, the decedent was necessitated to seek employment, and after working from October, 1917, until January 1, 1918, he was compelled to relinquish work by reason of his physical inability to continue, and died six weeks thereafter. The petitioner produced a physician who testified that the deceased came to him in October, 1917, and remained under his medical care until January, 1918, and that in his opinion the cause of decedent's death was general tuberculosis; that is, a condition of the disease which affected the entire system without being localized.

This testimony was controverted by the physicians who testified on behalf of the prosecutor that the cause of death of the decedent was not

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attributable to an injury, but was due to heart disease, a not unusual result of rheumatism.

We think, however, an inference may be properly drawn from the evidence in the cause that the nature of the decedent's injuries was of such seriousness as to greatly impoverish his system and predispose it to an infection of tuberculosis, of which there was not the slightest indication before the injury. For, according to the testimony, the decedent, before he was injured, was a man in full health and vigor, and immediately after he began to fail and grow weaker, from day to day, without any other apparent cause than from the injuries sustained by him; and if the cause of his death was tuberculosis, general in its character, and which culminated in death in a little over a year, it is difficult to escape the conclusion that the cause of death was an incident resulting from the accident.

And even if we adopted the theory of the prosecutor's counsel that heart disease caused the decedents death, we are still confronted with the situation that a strong, vigorous, hard-working man without any indication of heart disease develops that trouble after a serious injury, as appears in this case, and therefore, it seems to us, that there is a permissible inference that, if heart disease was the proximate cause of the decedents death, it was superinduced by the injury.

While, concededly, the time which elapsed between the date of injury and date of death was sufficiently long for the decedent to have developed or contracted some fatal disease from a wholly independent cause, still, in view of the circumstantial evidence tending to establish an unbroken continuity of physical degeneration of the former vigorous constitution of the decedent, immediately following the injury to the day of his death, we cannot properly say that there was no evidence on which the court could make a finding that the death of the deceased was due to the accident.

The judgment is affirmed, with costs

COURT OF CHANCERY OF NEW JERSEY.

STEEL & IRON MONGERS, INC.

v.

BONNITE INSULATOR CO. (No. 45/670.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—INSOLVENT EMPLOYER—"PREFERENCE."

The preference given by section 22 of the Workmen's Compensation Act (C. S. N. J., 1st Supplement, p. 1638) is, in the case of insolvent corporation, under section 83 of an Act Concerning Corporations (2 C. S. 1910, p. 1650), confined to an amount representing the weekly award for the two months preceding the institution of the proceedings in insolvency.

(For other cases, see Master and Servant, Dec. Dig. § 393¼.)

(For other definitions, see Words and Phrases, First and Second Series, Preference.)

* Decision rendered, March 5, 1919. 106 Atl. Rep. 380. Syllabus by the Court.

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Action by the Steel & Iron Mongers, Incorporated, against the Bonnite Insulator Company. From the determination of the receiver of the Insulator Company, an insolvent corporation, on a claim for an award by the Workmen's Compensation Aid Bureau, complainant appeals. Affirmed.

Cortland & Wayne Parker, of Newark, for appellant.
Samuel Kaufman, of Newark, receiver pro se.

LANE, V. C. The appellant filed with the receiver of the Bonnite Insulator Company, an insolvent corporation, a claim for $951.50 based on an award made by the Workmen's Compensation Aid Bureau under the provisions of the Workmen's Compensation Act (C. S. N. J., 1st Supplement, p. 1638), and an agreement made between the employer and employee, after the award, under the terms of which the employee was to receive compensation at the rate of $5.50 per week for 7 weeks for temporary disability and compensation for permanent injury at the rate of $5.50 a week for 200 weeks, totaling $1,100, which agreement was duly filed with the Department of Labor and approved by the department June 19,1918. Compensation for temporary disability was fully paid and compensation on account of permanent disability had been paid to the extent of $148.50, leaving due, or to become due, on account of the award and agreement, $951.50. Appellant asks preference in the distribution of the assets of the estate. The receiver allowed the claim as preferred for $44, making up such figure by considering the $5.50 per week unpaid for the two months preceding the date when proceedings in solvency were actually instituted and begun against the insolvent corporation as preferred under the provisions of section 83 of the Act Concerning Corporations (Revision of 1896, 2 C. S. N. J. p. 1650), and allowed the claim as unsecured for the balance of the award. Appellant rested his right to preference upon the provisions of section 22 of the Workmen's Compensation Act (C. S. of N. J., 1st Supplement, p. 1650), which reads as follows:

"The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor."

By a supplement to the Workmen's Compensation Act (P. L. 1915, p. 364; C. S. N. J., 1st Supplement, p. 1651) arbitrary section 22a, it is provided any judgment entered in the court of common pleas pursuant to the provisions of the act may be docketed in the Supreme Court, and thenceforward operate as a judgment rendered in that court. Section 21 of the act (C. S. N. J., 1st Supplement, p. 1649) gives the court of common pleas power to commute the compensation awarded at its present value when discounted at 5 per cent. simple interest. In the instant case, there has been no commutation, nor has any judgment been entered or docketed as provided by section 22a.

The determination of the question turns upon the meaning of section 22. That section does not purport to give a general preference. The preference given is such "as is now or may hereafter be allowed by law for a claim for unpaid wages for labor." When resort is had to legislation providing for preferences for claims for labor, it will be discovered that there is no general preference provided for. The act to secure to operatives in manufactories and other employees their wages (3 C. S. N. J. § 94, p. 3044) provides that no goods, chattels, or personal property whatsoever, being in this state, and belonging to any manufacturer or other person or persons, or to any corporation, shall be liable to be removed by virtue of any execution, attachment, or other process, unless the party by whom, or at whose suit said execution, attachment, or other process was issued or sued out, shall first pay or cause to be paid to the operatives, mechanics, and other employees wages then owing, not exceeding

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two months. Section 83 of the Act Concerning Corporations (Revision of 1896, 2 C. S. N. J. p. 1650) provides:

"In case of the insolvency of any corporation the laborers and workmen, and all persons doing labor or service of whatever character in the regular employ of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work and services done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation."

Under the General Assignment Act (1 C. S. N. J. § 10, p. 118) labor is made preferred to the extent of $300.

It is difficult to understand precisely what the Legislature meant by the language used in section 22 of the Workmen's Compensation Act. If it had been intended to give a general preference to the amounts awarded as compensation, clear language expressing such purpose might have been used. The term "right of compensation," used in section 22, must of course, refer to the amounts awarded as compensation. The same preference then is given to the claimant for such amounts as is allowed by law for a claim for unpaid wages for labor. The claim for unpaid wages for labor allowed in the case of insolvent corporations is prescribed by section 83 of the Corporation Act, and is for claims for labor for a period not exceeding two months prior to the institution of the proceedings in insolvency. Labor is therefore given but a limited preference. A holding that the entire amount of the award for compensation under the Workmen's Act is entitled to preference would require a disregard of the limited preference given to labor, and of the fact that if such had been intended apt and clear language was available to express such an intent. While the award may not be considered in all respects as wages accruing, the award being in reality for injuries sustained, yet in order to make effective, in any way, the provisions of section 22, I think that, for the purpose of that section, the award must be considered as the nature of wages, and the preference is confined to the amount accrued and unpaid, computed at the weekly rate for the two months preceding the institution of the proceedings in insolvency.

The action of the receiver upon the claim, therefore, will be sustained.

I express no opinion, the matter not being before me upon this appeal, as to whether the receiver is correct in allowing the unpaid balance to accrue as an unsecured claim for the face amount, as to whether he ought not to have allowed it for the present value commuted in accordance with the provisions of the act.

No costs to either party. Settle order on one day's notice.

COURT OF APPEALS OF NEW YORK.

SPERDUTO

v.

NEW YORK CITY INTERBOROUGH RY. CO.*

I. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT — PROCEEDINGS — REVIEW — APPEAL — "AWARD OR DECISION."

A notice sent by the state Industrial Commission, to a self-insurer under the Workmen's Compensation Law, requiring that the present value

* Decision rendered, March 18, 1919. 123 N. E. Rep. 207.

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of an award of weekly compensation be paid into a special fund under Workmen's Compensation Law, § 27, as amended by Laws 1917, c. 705, pursuant to a general resolution by the commission, is not an award or decision of the commission within Workmen's Compensation Law, § 23, and not appealable.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS—AWARD—RIGHT TO CHANGE.

An award of weekly compensation under under the Workman's Compensation Law is in effect a judgment, and cannot be changed by requiring payment of the present value thereof into a special fund without notice and opportunity to be heard being given the interested parties, nor after the giving of such notice and opportunity can it be vacated or modified by a general resolution.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings for compensation under the Workmen's Compensation Act by Carmela Sperduto, widow of Angelo Sperduto, employee, opposed by the New York City Interborough Railway Company. From an order of the Appellate Division (186 App. Div. 145, 173 N. Y. Supp. 834), reversing what it considered a determination of the state Industrial Commission, the state Industrial Commission appeals. Appeal dismissed.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, of Albany, of counsel), for appellant.

Alfred T. Davidson, of New York City, for respondent.

McLaughlin, J. The respondent is, and during the times referred to was, a self-insurer under the Workmen's Compensation Law (Consol. Laws, c. 67). Some time prior to the 6th of March, 1918, one Angelo Sperduto, while in its employ, received an injury which resulted in his death, for which, on the 14th of March, 1918, an award of compensation was made to his widow and dependents. The award directed that certain payments be made per week, to the widow during widowhood, and to the dependents during dependency.

On the 21st of May, 1918, the Commission passed a resolution to the effect that every mutual compensation insurance company and every self-insurer should, on or before July 31, 1918, pay into the state fund, as a special fund, under the terms of section 27 of the Workmen's Compensation Law, as amended by Chapter 705 of the Laws of 1917, the present value as of that date of the future installments of death benefits under every award against such carrier for death occurring as a result of accident happening between July 1, 1917, and December 31, 1917, inclusive,

On the 28th of June following, the commission, by its cashier, sent to the respondent a notice which referred to the claim by number, and read, in part, as follows:

"Gentlemen.—Pursuant to the requirements of a resolution of the State Industrial Commission, dated May 21, 1918, you are hereby instructed to pay into the State Insurance Fund, under the terms of section 27 of the Workmen's Compensation Law, the following amounts in respect of the above-numbered award:

Net present value of future installments of compensation	$5,456.11
Loading for administration expense (4%)	218.24
Total to be paid in	$5,674.35

"This amount is required to be paid on or before July 31, 1918."

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After the receipt of this notice, the employer served a notice of appeal which read, in part, as follows:

"Please take notice that New York City Interborough Railway Company, the above-named employer and self-insurer, hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from a decision and award of the State Industrial Commission, Bureau of Workmen's Compensation, made herein and dated June 28, 1918, whereby New York City Interborough Railway Company, the employer and self-insurer, is instructed to pay into the state insurance fund under the terms of section 27 of the Workmen's Compensation Law, the following amounts, in respect of this award."

Then follow the amounts directed to be paid.

The Appellate Division considered the notice sent out by the cashier as a determination or decision, and reversed it. The attorney General appeals to this court.

[1] Section 23 of the Workmen's Compensation Law (Consol. Laws, c. 67) permits an appeal from an award or decision of the commission. This notice was neither. The appeal, therefore, presents nothing which this court can review, and must be dismissed.

[2] While the appeal does not bring up for consideration the validity of the resolution adopted May 21, 1918, we think, for the guidance of the commission, it is proper to state that if it did, the same result would follow. The award made was in the nature of a judgment. It finally and conclusively determined the rights of the parties under the Workmen's Compensation Law. It could not be substantially changed, as proposed in this case, without notice to the parties interested and an opportunity given them to be heard. After such notice and opportunity, before a different method of payment could be fixed, the award previously made either had to be vacated or modified, and that could not be done by an omnibus resolution like the one adopted. In saying this, however, we do not mean to intimate that section 27, as amended by chapter 705 of the Laws of 1917, is a valid legislative enactment. That question is not before us, and we do not consider it.

The appeal should be dismissed, without costs.

Hiscock, C. J., and Chase, Collin, Cuddebach, and Crane, JJ., concur; Hogan, J., concurs in result.

Appeal dismissed.

COURT OF APPEALS OF NEW YORK.

SWEETING

v.

AMERICAN KNIFE CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —AWARD FOR DISFIGUREMENT.

Workmen's Compensation Law, § 15, subd. 3, as amended by Laws 1916, c. 622, § 3, providing that in case of an injury resulting in serious facial or head disfigurement, the commission may make an award not to exceed $3,500, is constitutional, at least in so far as facial disfigurement is related to loss of earnings.

(For other cases see, Master and Servant, Dec. Dig. § 347.)

* Decision rendered, April 8, 1919. 123 N. E. Rep. 82.

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Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of George Sweeting, employee, for compensation under Workmen's Compensation Law, against the American Knife Company, the employer, and insurance carrier. From an order of the Appellate Division of the Supreme Court for the Third Department (172 N. Y. Supp. 921), affirming an award of the state Industrial Commission, the employer and insurance carrier appeal. Order affirmed.

Wm. H. Foster, of Syracuse, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of Counsel), for respondent.

CARDOZA, J. The claimant was employed in the grinding department of the American Knife Company. The explosion of an emery wheel destroyed the bridge of his nose, giving him what is commonly called a flat nose, with deep scars upon his face. The state Industrial Commission made an award of $2,500 for serious facial disfigurement. Subdivision 3 of section 15 of the Workmen's Compensation Law (Consol. Laws, c. 67 [as amended in 1916]) provides that—

"In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed $3,500."

The employer and the insurance carrier insist that this provision of the statute is unconstitutional and void.

The argument is that the purpose of the amendment is to compensate the workman for injuries that have no relation to his earning power. If that were in truth the purpose, the statute would still be valid. Matter of Erickson v. Preuss, 223 N. Y. 365. 119 N. E. 555. The Constitution (article 1, § 19) authorizes the adoption of a system of insurance to compensate employees for injuries without regard to fault. Insurance against pain of mind and body is as legitimate, if the amount is kept within the bounds of moderation, as insurance against loss of earnings. It is of no moment that some other measure of compensation may have prevailed in the past. The Constitution does not stereotype the forms of legislation. The common law gave the workman compensation for pain and suffering, as well as for loss of earnings, when the employer was at fault. The statute takes that remedy away, and substitutes insurance within prescribed limits, irrespective of fault. Pain and suffering are part of the risks of the employment. The Legislature may make them part of the risks of the insurance. The one restriction on its power is that the burden must be reasonable. Mountain Timber Co. v. Washington, 243 U. S. 219, 240, 241, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; N. Y. Central R. R. Co. v. White, 243 U. S. 188, 207, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629.

The statute would stand, therefore, though facial disfigurement were unrelated to loss of earnings. But in truth it *is* related, and so the Legislature must have found. One cannot defeat a statute by a presumption that in its enactment the truths of life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others. There may, of course, be individual instances of disfigurement without impairment of earning power. That is true also where there has been the loss of a finger or a foot or an eye. Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.

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The argument is made, however, that the findings are defective. If the purpose of the statute is to compensate for loss of earnings, there should be a finding, it is said, that the result of the claimant's disfigurement will be diminished earning power. One might as well argue that without a like finding there could be no recovery for the loss of a finger or a foot or an eye. The commission has found that there has been serious facial disfigurement, and that an award of $2,500 is fair and equitable. Those are the ultimate facts to be embodied in the decision. The capacities and opportunities of the individual claimant have at the utmost an evidential value. It is true that the commission has a wide discretion, and in fixing a fair and equitable compensation it may inquire into all the circumstances that will help to guide its judgment. But those circumstances, however pertinent as evidence, have no place in the findings. The mutilated face, like the mutilated arm or leg, is the capital fact upon which liability depends. The injury alone, without other proof of loss, makes out the claimant's handicap in the struggle of existence. Given the fact of injury, the commission is to assess the damages. The presumption is that all relevant circumstances have been weighed in the assessment. These findings, therefore, would be adequate even if the commission were a court. But in truth it is not a court, and the niceties of code practice have no place in its procedure. Its decision states the facts essential to liability. No more should be exacted.

There is nothing in the point that the extent of compensation must be determined by a jury. The Constitution authorizes "the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation." Const. art. 1, § 19. The award is not redress for a tort. It is an allotment to an insured workman of his proportion of a fund maintained for his insurance. Mountain Timber Co. v. Washington, supra, 243 U. S. at page 235, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. Nor does the statute become invalid because the commission has some discretion in fixing the amount. The Legislature may provide for such a method of "adjustment, determination and and settlement" as it will. There is reason for the distinction which it has drawn between facial disfigurement and other injuries, though the reason is hardly our concern. Some injuries, as for instance the loss of a limb, may be so defined and classified that the appropriate compensation may, with a fair average of justice, be estimated in advance. But cases of disfigurement have their special problems. It is difficult, if not impossible, to define and classify the injuries. A flexible compensation compensation makes for justice alike to employer and to workman. It is not important that a lump payment is exacted. That may be done in other cases. Workmen's Compensation Law, § 27. The payment is not made by the employer himself, if he insures in the state fund, except to the extent of the premium which he pays for his insurance. Sections 50, 53. It is a charge upon the fund. He may, of course, be a self-insurer, or pay his premiums to an insurance company (section 50), but that is only at his option.

The statute is constitutional, and the proceedings under it have been regular.

The order should be affirmed, with costs.

POUND, J. (concurring). I concur in the result. The compensation awarded to the employee under the workmen's Compensation Law is based on loss of earning power. An allowance for serious facial or head disfigurement, so far as such disfigurement has no relation to disability, is an anomaly. Matter of Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379. The language of the opinion in the Erickson Case, 223 N. Y. 365, 368, 119 N. E. 555, 556. "The commission may now make an award for serious facial or head disfigurement, *even though such disfigurement does not diminish or impair the earning capacity of the claimant,*" is un-

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necessarily broad, and might have been limited to the language of the act itself, which does not include the words italicized.

Doubtless the general language of the New York Constitution (article 1, § 19) would permit us to uphold a statute which awards compensation to employees for *all* industrial injuries, without trial by jury, but the theory of the Compensation Acts is that the community rather than the injured workmen should carry the burden of *impaired earning capacity* due to accident . If that theory is extended to cases where the injured man can still work and get work and an administrative board is permitted to assess the damages, a new problem is introduced as to the limits of legislative power (U. S. Const. Amend. 14) and the reasonableness of the burden, the solution of which is not so easy. N. Y. Central R. R. Co. v. White, 243 U. S. 188, 202, 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629.

Serious facial or head disfigurement may leave one *able* to work and *unable to* get work. Employers might refuse to employ a disfigured man in his trade either from lack of confidence in his unimpaired ability or because it would be unpleasant for others to work beside him or unprofitable to have him meet the customers. A woman whose hair has been torn off or whose face was badly scarred might be so repulsive to the eye that no one could employ her and yet be as competent as ever to do her work. In a lesser degree, the seriously disfigured face or head of a man might lead to discrimination against him. The house of Lords in Ball v. Hunt & Sons (1912, A. C.. 496), upholding an award for such injuries, said:

"The injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages."

The New York Statute, by mentioning facial injuries, merely makes plain what the English act leaves to interpretation. If this award for disfigurement is placed on the broad ground of impaired ability *to get work,* no violence is done to the purpose of the act. In the absence of a finding of fact negativing such impaired ability on the facts in this case, the award should be sustained. W. C. L. § 21. The order should be affirmed, with costs.

McLaughlin and Andrews, JJ., concur with Cardoza, J.

Hiscock, C. J., and Pound, J., concur in result in memorandum by Pound, J.

Chase and Hogan, JJ., vote to remit case to Industrial Commission for further hearing of absence of findings showing that disfigurement has resulted in loss of earning power or to ability to obtain employment.

Order affirmed.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BERMAN

v.

RELIANCE METAL SPINNING & STAMPING CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EMPLOYEES ENTITLED TO COMPENSATION.

A superintendent and manager of an industrial plant *held* entitled to and award under the Workmen's Compensation Act for personal injuries

* Decision rendered, May 7, 1919, 175 N. Y. Supp. 838.

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sustained while instructing an employee in the use of machinery, notwithstanding he was the treasurer of the company and drew a salary of $5,000 a year.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—ESTIMATE OF PROPORTIONATE LOSS OF USE OF HAND.

Where an employee, as a result of an injury lost four of his fingers on the right hand, the Industrial Commission was authorized under the statute to estimate the proportionate loss of the use of claimant's hand.

(For other cases, see Master and Servant, Dec. Dig. § 385[4].)

Lyon and Cochrane, JJ., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Morris Berman for compensation for personal injuries, opposed by the Reliance Metal Spinning & Stamping Company, employer, and the Maryland Casualty Company, insurance carrier. From an award by the State Industrial Commission, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

James J. Mahoney, of New York City (George J. Stacey, of New York City, on the brief), for appellants.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen. of Counsel), for respondent.

WOODWARD, J. Morris Berman is the owner of a considerable number of shares of stock in the Reliance Metal Spinning & Stamping Company, and is the treasurer of such company, though his duties as treasurer appear to be comparatively unimportant. He was, at the time of the accident resulting in the loss of four of his fingers on the right hand, employed as manager of the plant, and was engaged in instructing an employee in the use of a machine. No question is raised as to the general character of his employment. No one questions that he was injured while in the discharge of his ordinary duties; but it is urged that because he was the treasurer of the company, and was paid a salary of $5,000 per year, he was not within the Workmen's Compensation Law (Consol. Laws, c. 67; and the case of Matter of Bowne v. Bowne Co. 221 N. Y. 28, 116 N. E. 364, is relied upon for this contention.

We think there is a clear distinction in the cases. The Industrial Commission in that case found that the claimant was "employed as president," and he was injured while temporarily assisting some laborers in handling lumber. He was paid a salary of $70 per week in his employment as president, and this salary was continued after the accident, the claimant being the majority stockholder of the corporation, and it is entirely obvious from the facts stated that the claimant was not employed in a hazardous occupation within the meaning of the statute, for he was employed as president, and there is nothing in the duties of a president of a manufacturing corporation, having charge of the business, which requires him to handle lumber. He was not, so far as appears from the case, employed for such a purpose.

[1] Here the claimant is a high-priced laborer, the superintendent of the plant, and he is injured while in the discharge of the duties in which he is regularly employed, and of course is entitled to the same protection which comes to any other man actually employed in a hazard-

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ous work. It is not the fact that a man is a stockholder and officer of the corporation that determines; it is the character of his employment. If the claimant had been employed as treasurer of the corporation at a fixed salary as such treasurer, and he was employed for that purpose and such duties as should be incident to such employment, he would not be entitled to compensation if he went out into the factory and undertook other employment, because he would not be employed for such a purpose—would not be within the contemplation of the insurance. But this man was included in the insurance as superintendent or manager of the plant, and while engaged in his regular employment he was within the letter and the spirit of the act.

[2] We are of the opinion that under the statute it was competent for the Industrial Commission to estimate the proportionate loss of the use of claimant's hand, and that the award is not to be disturbed on this account. While the commuting of awards and the payment of lump sums is not to be encouraged, and should not be restorted to except in special cases where justice will be promoted upon the shown facts, we think there is no occasion for interference here, as the parties appear to have originally acquiesced in this disposition while questioning the authority to make the award.

The award of the State Industrial Commission should be affirmed. All concur, except Lyon and Cochrane, JJ., dissenting.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BRASSARD

v.

DELAWARE & H. CO.*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION — "EMPLOYEE."

An applicant for work, who, after having passed the night in defendant's boarding cars, had failed to report in the morning, as directed, to ascertain whether he could obtain employment, was injured while going to a car for his midday meal, was not an "employee," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION — EMPLOYEES—CONTINUANCE OF EMPLOYMENT.

A claimant under the Workmen's Compensation Act, who had worked for defendant in another town and made application for work in the town where injured, and who traveled on a pass issued by defendant and made application at defendant's employment bureau at destination, but was told to report the next morning, did not retain the status of an

* Decision rendered, March 5, 1919. 175 N. Y. Supp. 359.

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employee, so as to recover for injuries incurred before being assigned to work.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION — COURSE OF EMPLOYMENT.

One who was injured while going to defendant's dining car to eat his midday meal was not entitled to compensation as for an injury in the course of his employment, where he had done no work for defendant, but merely applied for employment, although he had eaten supper and breakfast with defendant's permission; such permission being restricted to such meals.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Aime Brassard (Fred Talbot) for personal injuries, opposed by the Delaware & Hudson Company, employer. From an award by the Industrial Commission to claimant for the loss of his left arm, the employer appeals. Reversed and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellegg, JJ.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

Lewis E. Carr, of Albany, for appellant.

William T. Byrne, of Albany, for respondent.

HENRY T. KELLOGG, J. The claimant was injured in the railroad yard of the Delaware & Hudson Company at Colonie, N. Y., at about noon on the 15th day of January, 1918. He was on his way across the tracks in the yard to get a midday meal at a dining car provided for employees. Finding that a train occupied one of the tracks, he started to cross underneath a car, when the train moved and he was struck. Claimant asserts that he was at the time an employee of the Delaware & Hudson Company, and was injured while in the course of his employment.

The claimant had been employed by the appellant at its coal chutes at Colonie, N. Y., for 75 hours during the months of April and May, 1917. He was not again employed by the appellant until December, 1917, during which month he worked for 164 hours at its coal chutes at Carbondale, Pa. While at the latter place he informed a Mr. Kutz, who kept a railway boarding house for the appellant, that he desired to get work at Colonie. He obtained from him a railway pass to Colonie, and being paid in full, started for Albany over the railroad of the appellant. Ariving on the night on January 2, 1918, he remained in Albany until the 4th of January, paying his own expenses for board and lodging. While there he made application to an employment bureau for work in the employ of the appellant. At about 4 of the afternoon of January 4th he left for Colonie. He arrived at about 4:30, and there interviewed a clerk of the appellant, whom he asked for work. He was questioned as to his work at Carbondale, and was told that, while no such work was open, there was a call for three men at the roundhouse in the yards at Colonie. He told the clerk that he desired to lodge and board at the railway cars provided by the appellant for employees, at $4.20 a week. The clerk handed him a card marked with a number, and gave cards to two applicants for work who had accompanied claimant. He handed claimant a

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piece of paper, to use at the boarding car, reading "Give these three men supper and breakfast," and told him to report at the office before 7 in the morning to find out where he was to work and what the work would be. The character of the work to be done was not agreed upon and the compensation to be paid was not mentioned. The claimant got his supper and breakfast at the boarding car, and spent the night on a sleeping car of the appellant which was provided for laborers. He did not return in the morning before 7 to the clerk at the office as instructed, but instead slept until 8:30, and, having had his breakfast, spent the morning on the sleeping car. When the noonday whistle blew, he started across the tracks for the boarding car to get his dinner, and it was then that he was struck and injured.

[1, 2] The claimant was not an employee of the appellant at the time of the accident. He was not such an employee through the continuance of any contract made at Carbondale. He worked at that place by the day, and was paid by the day at an hourly and overtime rate. It must certainly be that a laborer not at work remains in an employment only by virtue of continuing promises both to hire and to work. If there is no binding promise to work further, there is no binding promise to hire further. Claimant did not promise to work at Carbondale for more than a day at a time. Nor, when he left that place, did he promise to work for appellant at Colonie. Moreover, he was not then promised further work, nor does it appear that any person at Carbondale, to whom he talked, had power to engage him for work at Colonie. His conduct in remaining in Albany two nights and days, and in applying at the employment bureau there for work, clearly shows that he did not consider himself to be at that time an employee of the appellant. Nor did the claimant become an employee through his conversation with the clerk at Colonie. No contract was then arrived at, for neither the work to be done nor the compensation to be paid was agreed upon, nor did the clerk positively state that he would give the claimant work. The conversation was purely tentative and the claimant and the clerk were to arrange the matter on the following morning. That is why the claimant was told to come to the office before 7 o'clock. That is why the clerk gave claimant a ticket for supper and breakfast only. Even if an offer of work was made, that offer was conditional upon the return of the claimant, and when claimant failed to return the offer terminated. It is clear that the claimant, though an applicant for work was never, in fact, employed.

[3] Even if claimant was an employee of the appellant, he was not acting in the course of his employment when injured. It is true that an employee is within the protection of the Workmen's Compensation Law (Consol. Laws c.67), not only when actually at work, but also while upon the premises of his employer he is going to or from work, or to or from a meal, or while at a meal which is had upon the premises during a temporary interruption of work. This claimant was not going to or from his work at the time of the injury, nor was he going to a meal during the interruption of his work, for he had as yet not worked at all. Finally, he was not going to a meal upon the premises, which he was permitted to take there, for his card to the boarding house was for supper and breakfast only, and both these meals he had already eaten. He had no right to a noonday meal at the boarding house. Therefore the claimant, even though an employee, was not in the course of his employment when injured.

The award should be reversed, and the claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

FREY

v.

McLOUGHLIN BROS. INC., ET AL.*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEPENDENTS—EVIDENCE.

In a proceeding under the Workmen's Compensation Act for compensation for the death of claimant's minor daughter, evidence *held* not to show that the mother, who was the claimant, was dependent on the earnings of the daughter.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Mrs. Barbara Frey for compensation for the death of Mary Frey, opposed by McLoughlin Bros., Incorporated, employer, and the Employers' Liability Assurance Company, insurance carrier. From an award of the State Industrial Commission in favor of claimant, the employer and insurance carrier appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent State Industrial Commission.

WOODWARD, J. Mary Frey was a girl 19 years of age, living at home with her parents, and employed by McLoughlin Bros., Incorporated, in a hazardous employment. On the 10th of August, 1917, this girl drove a tack through one of her fingers, in the course of her employment, and one week later she died, and the evidence supports, we believe, the finding that she died of blood poisoning. A claim was made on behalf of the father and mother as dependents. The claim of the father was rejected, on the ground that there was no dependency shown, but, strangely enough, the commission, by a divided vote, found that the mother, the wife of the independent father, living in his home, was a dependent.

[1, 2] Of course the earnings of this minor child belonged to the father under the ordinary rules of law. They amounted to about $8 per week. She had been working about two years, and the mother says that the reason she was at work was because she was "a big girl, and there was no reason why she should sit around and do nothing, and her father do all the work; she was a strong girl." We find no evidence in the case that the mother depended on the earnings of this girl. Her husband was at the time of the accident (and this is the only time that the statute considers—Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 50, 167 N. Y. Supp. 520, and authority there cited)

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* Decision rendered, May 7, 1919. 175 N. Y. Supp. 873.

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drawing a salary of $20 per week, and there is no evidence from which it can be made to appear that this did not afford the support of these two people. There is testimony that the daughter turned all of her wages, $8 per week, over to her mother, and that this was necessary to the support of the family; but this must be taken in connection with the fact that the daughter constituted one-third of the family and presumptively it required as much for her support as for any any one of them, and this was less than one-third of the income of the family from wages.

Moreover, it appears that the father owned a four-family frame house of the assessed valuation of $4,500, on which there was a mortgage of $2,500, and that they had $1,000 in bank. The house was rented, and the testimony shows that the income was sufficient to take care of the interest and taxes, and there is evidence that the family at the time of the death of the daughter was able to save $2 per week, and that after the death of the daughter they were unable to save anything. It does not, however, show that the mother was dependent upon the income of the daughter. "The statute plainly intended that the award to each person should be for the support of such person" (Matter of Walz v. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6, 9, 155 N. Y. Supp. 703; Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 52, 167 N. Y. Supp. 520), and not for the purpose of paying the mortgage upon the property owned by the claimant's husband. The evidence here shows without dispute that the mother is getting the same support now that she had while the daugther was alive; she merely says that since Mary's death she could save nothing. But her husband owes her the legal duty of supporting her; he appears to be abundantly able to do this, and no lack of disposition to discharge the duty is shown. The family goes on living as usual; no change in housing, no change in food, fuel, clothing, etc., and because there is no surplus to pay upon the debts of the husband we may not conclude that the mother was dependent upon the $8 a week provided by the daughter. Assuming that it required all of the earnings of the father and daughter to keep up the family expenses, the danghter was contributing less than a third of this sum, and her death, from a financial standpoint, aside from the funeral expenses in excess of $100, would result in a saving to the family. And the question here is not the family, for an award has been denied to the father, but the depedency of the mother, and we find no evidence in the record from which the inference can be drawn that the mother has any less to-day than she had when her daughter was living, or that she was in any sense dependent upon her wages at the time of the accident and death.

The award should be reversed, and the claim dismissed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

KINSELLA

v.

NEW YORK CENT. R. CO.

COMMERRCE—WORKMEN'S COMPENSATION — EMPLOYEES ENGAGED IN "INTERSTATE COMMERCE."

An employee of a railroad company, who was fatally burned while cleaning a car homeward bound on an interstate trip, while standing in

*Decision rendered, March 14, 1919. 175 N. Y. Supp. 363.

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defendant's yard awaiting delivery to another carrier, was engaged at the time of his injury in "interstatee commerce," and not entitled to recover under the Workmen's Compensation Act.

(For other cases, see Commerce, Dec. Dig. § 27[6].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act (Consol Laws, c. 67) by Margaret Kinsella to recover compensation for the death of Michael J. Kinsella, opposed by the New York Central Railroad Company, employer and self-insurer. From an award of the State Industrial Commission for claimant, the employer appeals. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

Visscher, Whalen & Austen, of Albany, for appellant.

Philip J. O'Keefe, of Canandaigua, for respondent.

Henry T. Kellogg, J. The deceased was an employee of the New York Central Railroad Company. He was engaged in cleaning a Seaboard Air Line car standing on a track in a freight yard of his employer at Canandaigua, N. Y., when his clothes caught fire and he received such burns that he died. The car in question had recently made a journey from Brooklet, Ga., to Amsterdam, N. Y., with a cargo of melons. Having been unloaded, it was billed out of Amsterdam as an empty, on a home route card via Canandaigua, to Potomac Yard, Va. It arrived at Canandiagua on July 20, 1915, and there stood on track awaiting delivery to the Pennsylvania Railroad Company. It was during this temporary suspension of its journey that the accident occurred. On the day following the accident it was picked up by the Pennsylvania Railroad Company, and continued on its travels, homeward bound beyond the limits of the state. The car was making an interstate journey, and the deceased, who cleaned it, was at the time engaged in interstate commerce. Delk v. St. L. & San F. R. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; North Carolina Railroad Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann Cas. 1914C, 159; Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431. Therefore no award for this accident should have been made.

The award should be reversed, and the claim dismissed. All concur, except John M. Kellogg, who dissents.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

PIFUMER ET AL.

v.

RHEINSTEIN & HAAS, Inc., ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—AWARD TO DEPENDENT FATHER AND MOTHER.

Under Workmen's Compensation Law, § 17, an award in proper case to the father and mother of the deceased employee, on the ground of their dependency, the employee having left neither wife nor children, may be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEPENDENCY OF PARENTS—EVIDENCE.

Statement of deceased employee's brother that he had received from his parents in Italy letters stating that the parents were living on the remittances sent from America by the brothers *held* no evidence that the parents were dependent upon the deceased employee.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPENDENCY OF PARENTS—SUFFICIENCY OF EVIDENCE.

So-called certificates of "the mayor" and "the official" of a town in Italy that the parents of the deceased employee depended exclusively on deceased for their support, and that they existed on the fruits of small jobs, and were in a state of extreme poverty, *held* insufficient to establish dependency of parents.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PRESUMPTIONS OF DEPENDENCY AND EXISTENCE OF PARENTS.

There is no presumption of dependency on the part of the parents of a deceased employee 32 years of age, and hardly a presumption that such parents are living; their residence being in a foreign country.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ABSENCE OF EVIDENCE AS TO DEPENDENCY.

An award of compensation under the Workmen's Compensation Law may not be sustained, where there is no evidence of the essential fact of the dependency of the persons to whom the award is made.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

John M. Kellogg, P. J., and Lyon, J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claims of Venerando Pifumer and Venera Pifumer for compensation under the Workmen's Compensation Law

*Decision rendered, May 7, 1919. 175 N. Y. 848 Supp.

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for the death of John Pifumer against Rheinstein & Haas, Incorporated, the employer, and the Travelers' Insurance Company, insurance carrier. From an award of the State Industrial Commission in favor of claimants, the employer and insurance carrier appeal. Award reversed, and matter returned to the Commission for further consideration.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, and Clarence S. Zipp, of Hartford, Conn., of counsel), for appellants.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Olmsted, Van Bergen & Searl, of Syracuse, for claimants.

WOODWARD, J. The accident resulting in the death of John Pifumer occurred at Syracuse, while the decedent was employed by Rheinstein & Haas, Incorporated, of New York, in the construction of a building. There is no question about the accidental character of the death, or of any of the conditions of liability. The decedent had no wife or children, and the State Industrial Commission, under the the provisions of section 17 of the Workmen's Compensation Law (Consol. Laws, c. 67), has made an award to both the father and mother of the decedent, on the ground of dependency.

[1] This court is committed to the proposition that such an award, in a proper case, may be sustained (Cassella v. McCormick, 180 App. Div. 94, 167 N. Y. Supp. 564), and it does not seem necessary to go into that question on this appeal.

[2] The real question involved is whether there is any evidence in this case from which the state Industrial Commission was justified in finding that the parents of John Pifumer, residing in Italy, were dependent upon him in any measure for their support during the year next preceding the accident. There is some evidence that John Pifumer and his brother sent two remittances, aggregating less than $50, during the year in question, to the father, and the brother testified that "they lived on what he sent them"; that he had letters in which the father stated that they were living on what the brother sent them. No such letters were introduced in evidence; all we have is the statement of this brother that he had received such letters, which is obviously not evidence of any fact tending to show dependence. Assuming the existence of such letters, which is highly improbable, it does not show that they were dependent upon these remittances—does not show that the remittances were not for money owed by the decedent. The fact that they may have used the money for their support is entirely beside the question; we all make use of our income for our support, no doubt, but we are not necessarily dependent in a legal sense. The question is whether we are in a position where we require the assistance—where it is in a measure essential to our existence in a relative permanent condition.

[3-5] The only other matters shown in the record to establish this alleged dependency are certain so-called certificates. One of these, which declares that the—

"mayor of the above town certifies that the heirs of Giovanni Paffumi, son of Venerando Paffumi and Venera Campo, who died at Syracuse on August 18 last as the result of the accident, depended, exclusively on the deceased for their support. Said dependents, who are of an advanced age, are living in conditions little suited for self-maintenance. Such heirs of Giovanni Paffumi possess a small home and additional property

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valued at 100 lires ($15). The family exists on fruits of small jobs and are now in a state of extreme poverty. This is issued for the purpose of obtaining benefits."

The last sentence is superfluous; the purpose is obvious. In one breath we are told that the parents "depended exclusively on the deceased for their support," and in the next that the family owns a home, with some little property, and that it "exists on the fruits of small jobs"; and this very remarkable certificate is signed "The Mayor." A second alleged certificate is likewise said to be signed by "The Mayor," and a third by "The Official." No authentication of these alleged certificates exists; they are, in law, mere "scraps of paper," yet the State Industrial Commission makes award to these alleged dependents, whose very existence is not established by any possible legal evidence. See sections 952, 953, 956, Code of Civil Procedure. There is no presumption of dependency on the part of the parents of a man 32 years of age, hardly a presumption that such parents are living in a foreign country; and the Court of Appeals, in a very recent case, has held that these awards may not be sustained, where there is no evidence of the essential facts upon which the awards are made. No reason seems to exist why the requirement of evidence should not be the same in reference to the persons who are to receive the benefits, as upon the question of the accident or other matter on which the right to the award is based. Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Matter of Hansen v. Turner Construction Co., 224 N. Y. 331, 120 N. E. 693.

The award should be reversed, and the matter returned to the Commission for such further consideration as may be proper in the premises. All concur, except John M. Kellogg, P. J., and Lyon, J., who dissent.

COURT OF CIVIL APPEALS OF TEXAS.

EL PASO.

POE

v.

CONTINENTAL OIL & COTTON CO. ET AL. (No. 962.)

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE TO SERVANT.

Where an employer, sued for injuries, offers no proof to support the allegation that notice of provision for compensation had been given to servant by employer, as required by Employers' Liability Act, pt. 3, §§ 19, 20 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx), it must be presumed that no such notice had been given.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE TO SERVANT.

Where an employer had failed to give servant notice required by Employers' Liability Act, pt. 3, §§ 19, 20 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx), of employer's compliance with the act, the servant could institute suit against employer for personal injuries, but was not limited thereto, and could waive the provision with reference to notice and claim benefit under the act.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

* Decision rendered April 24, 1919. 211 S. W. Rep. 488.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE TO SERVANT—WAIVER.

Where a servant waived the want of notice required by the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), and sought compensation for injuries before the Industrial Accident Board, he could not thereafter recover from the employer by action in court, in view of section 3, pt. 1 (article 5246i).

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Appeal from Dstrict Court, Taylor County; Joe Burkett, Judge.

Action by C. C. Poe against John Guitar, doing business under the name of the Continental Oil & Cotton Company, and by an amended petition by the Georgia Casualty Company was also made a defendant. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Moffett and Sayles & Sayles, all of Abilene, for appellant.
Frank S. Anderson, of Galveston, for appellees.

HIGGINS, J. On June 20, 1917, appellant, Poe, brought this suit in the district court of Taylor county against appellee John Guitar, who was doing business under the name of Continental Oil & Cotton Company. Thereafter Poe filed an amended petition, making the Georgia Casualty Company a party defendant.

The suit is to recover the sum of $15,000 as damages arising from personal injuries. Among other things, appellant alleged that on and prior to October 8, 1915, Guitar, in the conduct of his business, operated in the city of Abilene a device known as a "go-devil" for removing and conveying cotton seed; that on said date appellant was working for Guitar, and while operating the go-devil was injured through the negligence of Guitar, his agents, etc. As to the Georgia Casualty Company, the petition sought a recovery against it, if it should be held that the plaintiff was not entitled to recover his damages against Guitar.

Defendants filed pleas in abatement, setting up that on and prior to October 8, 1915, defendant Guitar was a subscriber to and a member of the Georgia Casualty Company, a corporation authorized to transact business in the state of Texas, and under the provisions of the Employers' Liability Act (chapter 179, Acts of 33d Legislature [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz].), was authorized to insure the payment of compensation to injured employees, and that Guitar had paid a year's premium in advance and received a receipt therefor, and the Casualty Company had issued to Guitar a policy of insurance, a copy of which policy was attached and made a part of the pleas; that on October 8, 1915, Poe was employed by defendant Guitar, and while acting in the course of his employment claims to have received the injuries described in the petition; that on and prior to October 8, 1915, Guitar had in all respects complied with the provisions of the Employers' Liability Act, and had given notice in writing and print to all persons under contract of hire with him, including Poe, that he had provided for payment of compensation for injuries to his employees with the Georgia Casualty Company, as provided by sections 19 and 20, part 3, of the act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx), and that Poe had actual notice that Guitar had so provided for such payment of compensation, and thereafter continued in the employment of Guitar; that after sustaining his alleged injury the plaintiff elected to file and filed with the Industrial Accident Board a claim against the Casualty Company for compensation under the terms and provisions of the Employers' Liability Act, and that thereafter Poe and the Casualty Company submitted the matters in dispute in respect to said claim to the Industrial Accident Board, and on January 17, 1917, said board determined the claim upon its merits and adjudged that the Casualty Com-

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pany was released and discharged from the payment of compensation for the injuries alleged in plaintiff's petition, and that the judgment and order of the board was res judicata and a bar to any further claim to recover compensation for the injuries declared upon the plaintiff. The order of the Industrial Accident Board was made a part of the plea and reads as follows:

"January 17, 1917.

"C. C. Poe, Employee, v. Continental Oil & Cotton Company, Employer, and Georgia Casualty Company, Insurer.

"On this 17th day of January, A. D. 1917, after due notice to all parties at interest, came on to be considered by the Industrial Accident Board the claim of compensation filed with said board by C. C. Poe against the Georgia Casualty Company as the insurer for the Continental Oil & Cotton Company subscriber; and

"It appearing to the board that the questions involved herein have not hertofore been settled by agreement of the parties interested herein; and

"It further appearing to the board that the said C. C. Poe is not entitled to recover by reason of failure to make claim in the manner and within the time provided in the act:

"It is therefore ordered, adjudged, and decreed by the Industrial Accident Board that the Georgia Casualty Company be and the same is hereby fully released and discharged from the payment of any and all compensation by reason of the alleged injuries in the above case."

It was further alleged that Poe had thereby made an election of remedies, and was bound by his election and the board's order. The pleas in abatement came on for hearing before the court, and in support thereof the record of the proceedings before the Industrial Accident Board were offered in evidence. These proceedings disclosed the following facts:

On August 9, 1916, Poe, by his attorney, wrote the secretary of the board, advising that on October 8, 1915, Poe was injured while working for Guitar, doing business under the name aforesaid; that they understood Guitar was insured at the time of the accident, and requested the board to take the matter up for investigation and adjustment at once. On August 12th the Industrial Accident Board acknowledged receipt of the letter of the 9th, and inclosed a copy of a letter they had just written the Insurance Company, and advised Poe's attorneys, if a satisfactory disposition of the claim was not made with the Insurance Company under the the provisions of the Employers' Liability Act, within a reasonable time, to communicate that fact, and the board would then undertake the further discharge of its duty in the premises. On August 12th the Industrial Accident Board advised the Georgia Casualty Company that there had been upon file in that office for many months an original accident report made out by the Continental Oil & Cotton Company of October 8, 1915, and that there was nothing to indicate that compensation had been paid to the claimant; that the board was in receipt of a letter from the claimant's attorneys insisting that he was entitled to compensation under the provisions of the Compensation Act. The company was requested to give the matter its immediate attention, and if it found it was indebted for compensation to make payment to the claimant, and, on the other hand, if it denied liability, to notify the board, in order that it might be in position to take additional steps in the matter. On August 14th the Insurance Company acknowledged receipt of the letter by the board and advised that it was the first information it had that claim had been made for compensation under the act; that it was then making investigation, and would advise the result in a few days. The Casualty Company thereafter declined to make compensation to the claimant, and the Industrial Accident Board set the claim for hearing on January 17, 1916. Thereupon the claimant filed his affidavits with the board in support of his claim, and the Casualty Company in bar of the claim set up, with supporting

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affidavits that Poe had never made or filed a claim with the Continental Oil & Cotton Company, Georgia Casualty Company, or the Industrial Accident Board, as provided by section 4a, part 2, of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp), which provides:

"No proceedings for compensation for injury under this act, shall be maintained unless a notice of the injury shall have been given to the association or subscriber, as soon as practical after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same."

There was no claim made by the injured employee that he was or ever has been physically or mentally incapacitated to the extent that would prevent making such claim. Thereupon the claim came on for consideration by the Industrial accident Board, and the board entered its decree as set forth in the pleas in abatement. Upon the hearing of the pleas in abatement, no evidence was offered by the defendants to show that the written or printed notice required by the Employers' Liability Act had been given to Poe prior to the time he received his injuries.

Opinion.

[1,2] Since no proof was offered upon the hearing of the pleas to support the allegation that the written or printed notice had been given to Poe by the Continental Oil & Cotton Company, as required by articles 5246x and 5246xx, Vernon's Sayles' R. S., it must be presumed that no such notice had been given. It is unnecessary to dwell upon the importance of compliance with the provisions of the law with reference to such notice and the reasons why it is required to be given. This has been done in the cases of Kampmann v. Cross, 194 S. W. 437, and Rice v. Garrett, 194 S. W. 667. Upon the authority of these cases, since such notice had not been given, Poe had the right to institute a suit in the courts against Guitar to recover damages for personal injuries. See, also, Farmers', etc., v. Shelton, 202 S. W. 194; Batson-Milhome Co. v. Faulk, 209 S. W. 837. But, while this was his privilege, we do not think Poe was limited thereto; but, if he saw fit to do so, he could waive the provisions with reference to notice, claim the benefit of the act, and enforce against Guitar and his insurer, before the Industrial Accident Board, the liability for compensation imposed by the Employers' Liability Act. The right of employees to waive such notice was recognized in Rice v. Garrett, supra, and no sound reason occurs to this court why an employee should be deprived of the privilege of so doing. It is not to be forgotten that the act primarily is intended for the protection of employees and to guaranty compensation in case of injury or death, regardless of liability on the part of the employer under common-law or other statutory liability. The requirement that notice be given to employes is for their benefit, so that they may be advised in the premises and given the opportunity of serving or not serving a master who has availed himself of the benefits of the act. Middleton Case, 108 Tex. 96, 185 S. W. 556. In our opinion the law does not preclude an employee who has sustained injuries in the service of a master from waiving the want of such notice and enforcing before the Industrial Accident Board his claim for compensation under the act. As to some employees of a subscribing employer it might be to the interest of the master to withhold such notice and deprive them of the benefits of the act, while giving such notice to other employees, whose right and remedy would be thereby limited. Certainly it was not the intention of the act to thus allow a master, as to some employees to deprive them of the benefits of the act, and as to other employees limiting their remedy thereto. It is therefore held that the failure to give notice to Poe did not preclude him, after he had been injured, from waiving the want of notice, and he had the right to resort to the Industrial Accident Board to enforce his claim for com-

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pensation under the act. Having this right, we are of the further opinion that he waived the want of notice by claiming the benefit of the act and voluntarily presenting his claim to the board and invoking its action. In support of the views expressed, see Texas Refining Co. v. Alexander, 202 S. W. 131.

[3] The question now arises as to the effect of such waiver upon appellant's right to maintain the present suit. In this connection, appellees rely upon the doctrine that, by electing to claim under the act and enforce his right before the board, Poe., under the election of remedy doctrine, is precluded from maintaining this suit. The rule has been announced in this state that—

"In order to sustain a defense founded upon that doctrine [i. e., election of remedy], it must be made to appear that the plaintiff * * * had two valid, available, and inconsistent remedies, and that he undertook to pursue one. His supposition that he had a particular remedy and his effort to enforce it is immaterial, and does not constitute an election, unless the remedy in fact existed." Bandy v. Cates, 44 Tex. Civ. App. 38, 97 S. W. 710; Brodkey v. Lessor, 157 S. W. 457.

In the note to Clark v. Heath, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144, it is said to be well settled that—

"If a party has in fact only one remedy, but in the mistaken belief that he has another attempts to enforce it, the doctrine of election of remedies is inapplicable, for no choice was ever open to him. * * * Another statement of the rule is that one who has mistaken his remedy is not thereby precluded from pursuing a remedy to which he is entitled, or that there can be no binding election of remedies when the party never had a right of action as at first brought."

Appellant maintains that the doctrine of election of remedies is inapplicable, for the reason that his claim and right of action was not governed by the Employers' Liability Act, in that Guitar had not given the required written or printed notice; therefore the Industrial Accident Board was without jurisdiction and its ruling void, and since such board had no jurisdiction he never had a remedy under the act, and is therefore not precluded.

The failure of the employer to give Poe the required notice is not regarded as a matter which affected the jurisdiction of the Industrial Accident Board. Upon the contrary, as held above, it is regarded as a provision in the law, for the benefit of the employee, and a matter which he could waive, and by proper proceeding fix and recover the compensation provided by the act, and that the board in such a case would be the proper tribunal to which he should resort.

Under the rule anounced above, as to the election of remedies, it is doubtful whether Poe by that doctrine alone is precluded, because, when he filed his claim with the Industrial Accident Board, he had lost his right to compensation under the act by his failure to make claim within six months after the occurrence of his injury. He therefore had no available remedy before the board, but his only remedy was a suit in court to recover damages.

But if we are correct in our holding that the written or printed notice could be waived by appellant, and that he did not waive it by claiming the benefit of the act, presenting his claim to the board, and invoking its action, then it follows that the parties occupy the same attitude as if notice in the first instance had been given in the manner prescribed by law, and the further conclusion would necessarily ensue that the present suit cannot be maintained perforce of the third section, part 1, of the act (article 5246i, Vernon's Sayles' R. S.) which provides:

"The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employers for damages for injuries resulting in

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death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Texas Employees Insurance Association as the same is hereinafter provided for."

In section 1, part 4, of the act (article 5246yyy) it is provided:

"The following words and phrases, as used in this act, shall, unless a different meaning is plaintly required by the context, have the following meaning: * * * 'Subscriber' shall mean any employer who has become a member of the association by paying a year's premium in advance and received the receipt of the association therefor. * * *"

The Georgia Casualty Company had issued its policy insuring Guitar as authorized by section 2, part 4 (article 5246yyyy), which reads:

"Any insurance company, which term shall include mutual and reciprocal insurance companies lawfully transacting a liability or accident business within this state, shall have the same right to insure the liability to pay the compensation provided for by part one * * * of the act, and when such company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable under this act; and when such company insures such payment of compensation it shall be subject to the provisions of parts one, two and four * * * and of sections 10, * * * 17 * * * and 21 * * * of part three of this act."

Since appellant waived the want of notice, and the facts showing that in all other respects Guitar had availed himself of the benefits of the act, an become a subscriber, this court is of the opinion that, independent of the doctrine of election of remedies, and under the quoted sections of the act, the appellant has no right of action for damages for personal injuries as is here asserted, and, having made such waiver, he then could "look for compensation solely to the Texas Employers' Insurance Association as the same is hereinafter provided for."

Upon the views expressed, it follows that all assignments are without merit.

Affirmed.

COURT OF CIVIL APPEALS OF TEXAS.

TEXARKANA.

JENKINS

v.

TEXAS EMPLOYERS' INS. ASS'N. (No. 2101.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—SETTLEMENT—VALIDITY.

Under the Employers' Liability Act of 1913 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), article 5246q, of which authorizes an award if not settled by agreement of the parties, a settlement, made without fraud after injury, is binding; article 5246nn, invalidating an agreement by employee to waive his rights, referring only to agreements made prior to injury.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

Appeal from District Court, Rains County; Wm. Pierson, Judge.

Action by the Texas Employers' Insurance Association against Mat Jenkins. Judgment for plaintiff, and defendant appeals. Affirmed.

* Decision rendered, April 2, 1919. Rehearing denied, April 10, 1919. 211 S. W. Rep. 349.

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The appellant was in the employ of the Fraser Brick Company, and on September 15, 1916, he received an accidental injury in the course of his employment, which necessitated the amputation of the left foot. At the time of the injury the Fraser Brick Company was a subscribed to the Texas Employers' Insurance Association, but never notified the appellant of that fact. The average weekly earnings of the appellant for 12 months preceding the injury was $12. The Fraser Brick Company made a report of the injury to the Industrial Accident Board, and notice of the claim for compensation was made by the appellant to the said board and to the appellee association on September 23, 1916. On October 28, 1916, the appellant and the Frazer Brick Company and the Texas Employers' Insurance Association signed a written agreement of settlement of the claim for compensation. The amount agreed upon and actually paid to the appellant was $575. On June 27, 1917, the Industrial Accident Board proceeded to make an award of the compensation under the statute, and decided that the settlement of the claim was fraudulent and void. The insurance association appealed from the decision of the board, and on July 21, 1917, brought this suit in the district court of the county where the injury occurred, seeking to have the award of the board, and against the appellant.

The court made the findings of fact: (1) That there was a settlement between Mat Jenkins, the appellant, and the insurance association of the claim for injuries received at the plant of the Fraser Brick Company; and (2) that there was no fraud in the settlement. These facts have support in the evidence, and are sustained.

O. H. Rodes, of Emory, Campbell & Mansell, of Alba, and W. W. Campbell, of Houston, for appellant.

Harry P. Lawther, of Dallas, for appellee.

Levy, J. (after stating the facts as above). The trial court found as a fact that there was an agreed settlement for the injuries in evidence made between the appellant and the insurance association, and that such settlement was fairly made and without any fraud. In view of these facts the judgment of the trial court is warranted, it is believed; for the Employers' Liability Act of 1913 (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) in force when the settlement was effected, does not in terms forbid, or by implication preclude, a settlement by agrement between the parties interested. Under article 5246q, Vernon's Sayles' Ann. Civ. St. 1914, the Industrial Accident Board may make final ruling and decision upon an adjustment of a claim for compensation only (1) "if not settled by agreement of the parties interested therein," and (2) when the parties interested consent for the board to finally determine the claim. Roach v. Ass'n, 195 S. W. 328. The language, "if not settled by agreement of parties interested," would appear to show the clear purpose of the act to authorize and continue the inherent right of parties to make such fair and reasonable compromise settlement of the claim for compensation as they may themselves determine, and without the approval of the board. The potential jurisdiction of the board ceases, then, with the settlement by agreement of the parties. And there appears no language in the entire act precluding the right of the parties to make agreed settlement of compensation for injuries sustained. Article 5246nn, providing that "no agreement by an employee to waive his rights to compensation under this act shall be valid," has reference entirely to agreements in that respect made prior to the injury. As the parties had the right, it is thought, to make the agreed settlement, the law attaches binding force to such agreement, and the judgment should be affirmed.

Judgment affirmed.

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DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 2.

LEMLEY

v.

DOAK GAS ENGINE CO. ET AL. (Civ. 2702; S. F. 8504.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCEPTANCE OF STATUTE.

Employees employed at a daily wage are not required, by section 7 of the Roseberry Act, to file daily with employer that they refuse to be bound by the compensation provision of act.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYEES SUBJECT—ACCEPTANCE OF PROVISIONS.

Where deceased employee was hired at a daily wage before employer became subject to the compensation provisions of Roseberry Act, but employer became subject to it 17 days before the accident, the employee's failure to give notice of refusal to be bound by the act as provided in section 7 was not acceptance thereof on his part.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Laida F. Lemley, as administratrix of the estate of Clyde V. Lemley, deceased, against the Doak Gas Engine Company and the Pacific Foundry Company. From an adverse judgment, the first-named defendant appealed to the District Court of Appeal, which affirmed the judgment. Hearing denied by Supreme Court.

Geo. J. McDonough, of Oakland, and Stanley Moore and Geo. K. Ford, both of San Francisco, for plaintiff and respondent.

Fitzgerald, Abbott & Beardsley, of Oakland, and Chickering & Gregory, of San Francisco, for defendant and appellant.

Thomas, Beedy & Lanagan, of San Francisco, for defendant and respondent.

LANGDON, P. J. This is an appeal from a judgment for $7,500 in favor of the administratrix of the estate of Clyde V. Lemley, deceased, on account of the death of said deceased. There are two questions presented by the appeal. The first of these is: Was the deceased at the time of the accident which caused its death subject to the compensation provisions of the Roseberry Act?

The facts of the case, pertinent to this inquiry, are as follows: Lemley, the deceased, was employed by the foreman of the defendant Doak Gas Engine Company about the middle of January, 1913, as a machinist's helper. He continued to work daily at the plant of the defendant until March 8, 1913, the date on which he was killed. He had been hired at a daily wage. At the time of his employment his employer, the defendant herein, was not subject to the provisions of the Roseberry

*Decision rendered, Feb. 28, 1919. On hearing in Supreme Court in Bank, April 28, 1919. 180 Pac. Rep. 671.

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Act (St. 1911, p. 796). On February 19, 1913, which was 17 days before the day on which Lemley was killed, the employer elected to accept the provisions of this act. The deceased had not given to the defendant any notice that he elected not to become subject to the compensation provisions of the act up to the time of his death. It is conceded that the accident which brought about the death of Lemley arose out of his employment and occurred while he was acting in the course of his employment. The solution of the first point raised by appellant depends upon the proper construction of section 7 of the Roseberry Act. The significant portion of said section is as follows:

"Sec. 7. * * * Any employee as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall within the meaning of section 2 of this act be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

"(1) The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

"(2) At the time of entering into his contract of hire, express or implied, with such employer, such employee shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employee shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act."

[1, 2] The appellant seeks to bring deceased under the compensation provisions of said act by the contention that the contract of hire under which he was working at the time of his death was entered into after February 19, 1913, the date when the defendant became subject to the act, and that therefore deceased's failure to give notice in writing that he elected not to be subject to the act should be deemed an acceptance thereof. In support of this position appellant argues that the original employment, being at a daily wage, was a contract from day to day under the presumption raised by section 2010, Civil Code, and ended at the close of the first day; and that under section 2012, Civil Code, such express contract was replaced on each subsequent day that Lemley worked for the defendant by an implied contract of hire upon the terms of the original express contract. And this argument brings appellant to a position where it contends that the contract under which deceased was working at the time of his death was an implied contract, entered into the day of the accident upon the same terms as the original express contract, and that the deceased was under the obligation of rejecting the compensation provisions of the act on the morning of the accident or of being bound thereby. Section 2012, Civil Code, is as follows:

"*Renewal of Hiring.* Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service."

We think that in this case since the employee actually made an express contract with his employer, the fact that under section 2012 he may have automatically renewed it each day upon the same terms as those of the original contract by going to work each morning does not change the fact that the contract of employment was an express contract. and was made about the middle of January, before the defendant was subject to the provisions of the act. Section 2012 merely provides for a renewal of the original contract. We think that the language of the Roseberry Act, "At the time of entering into his contract of hire, express or implied, * * *" has reference to the original contract of hire, and not to any automatic renewal thereof. Appellant argues that since the words "express or implied" are used, the Legislature must have meant by the

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word "implied" the implied contract raised by section 2012, Civil Code, because appellant states:

"It is hard for us to conceive of any transaction to which this term [implied] can be attributed unless it be such a contract as is implied in law by section 2010 and 2012, Civil Code."

It is not difficult for us to conceive of an implied contract which shall also be the original contract of hire.

"A contract is implied to pay for services accepted by the defendant under such circumstances as to raise a presumption that he expected, or ought to have expected, that they were to be paid for." Parsons on Contracts, vol. 1, p. 4; Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901.

Section 7 of the act refers to the time of "entering" into the contract, and not to the time of "renewing" it. We believe that the section of the act above quoted plainly contemplates that an employee, under such circumstances as those in the present case, shall have 30 days after the employer accepts the provisions of the act within which to elect whether he (the employee) will be bound by the act or not. We are strengthened in this view by the fact, as pointed out by respondent in her brief, that the construction contended for by appellant would make it necessary for all employees whose compensation was fixed at a daily wage to file a notice with their employer each morning that they refused to accept the provisions of the act or else they would be bound thereby.

Appellant quotes from Matter of Zany, 20 Cal. App. 360, 129 Pac. 295, to the effect that a statute should be construed so as to void "absurd and unjust consequences," and we think that to so construe this statute as to place upon employees employed at a daily wage, the duty of filing with their employer each morning a written notice that they refuse to be bound by the provisions of the act would be to bring about a condition which would be both absurd and unjust. This clearly was not the intent of the Legislature. The "contract of hire" mentioned in the section quoted, we think, means the contract of hire made at the time the employee began his employment. That contract may have been either express or implied.

[3] The act provides that where the contract of hire was made in advance of the employer becoming subject to the provisions of the act (as in this case), the employee shall become subject to the provisions of the act when he shall remain in the service of his employer without giving notice in writing that he elects not to be subject to the act for a period of 30 days after the employer has filed with said board an election to the subject to the act. In this case the employee remained in the employment only 17 days after the employer became subject to the act, and therefore said employee did not become subject to the provisions of the act, and the trial court properly so decided.

The second point raised by appellant is that the court erred in admitting the testimony of one Downie as to his opinion of the cause of the accident, without any statement of the basis for such opinion, and that such error was prejudicial to the defendant.

The amended complaint set out three charges of negligence. First, that the deceased was not given a safe place to work; second, that the defendant knowingly directed the deceased to perform a particularly hazardous task without advising him of its dangerous nature; third, that the gas engine which was being tested by deceased at the time of the accident was being tested in a negligent manner in that no provision was made for the cooling of the flywheel after the same had been heated by friction and no protection was furnished to the employee against a possible breakage. The defendant company was engaged in the manufacture of internal combustion gas engines. On the day of the accident, certain engines were being tested as to horse power, one of them being the engine which caused the accident. The manner of testing was as follows: A 2x4 scantling about 10 feet long was placed under the flywheel of the engine, and an employee was directed to exert an upward force on the

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end of the scantling, away from the engine. The scantling came in contact with the flywheel, and necessarily retarded the same. Whether or not the requisite power was developed was determined by the amount of resistance the wheel could withstand. During a part of the day this engine was tested by a leather belt applied around the flywheel. The engine had been tested all day. The accident occurred late in the afternoon. The test was being performed by James E. Downie, a machinist employed by the defendant company. The flywheel had on several occasions during the day become heated. Lemley, the deceased, was a helper to Downie, the machinist, and was assisting in testing the engine. The deceased was instructed by Downie to hold the scantling against the flywheel of the engine while Downie went outside to inspect the exhaust pipe. While the deceased was applying this pressure the flywheel broke into many pieces, and a piece struck Lemley on the head, causing his death.

The witness Downie was called for the plaintiff and, after testifying fully regarding all the facts and circumstances surrounding the accident, he was asked the question: "Will you state to the jury, what, in your opinion, caused that flywheel to break?" Defendant objected to this question as "incompetent, irrelevant, and immaterial and calling for the opinion and conclusion of the witness on a matter not properly the subject of expert testimony, and upon the further ground that the proper foundation had not been laid, and it calls for an answer to the very question to be passed on by the jury." The court overruled the objection, and the witness answered: "I think the heat done it. That is why I went up and felt the flywheel."

[4] The ultimate questions to be passed upon by the jury were whether or not the engine was being negligently tested by the defendant company and whether or not the employer had furnished the employee with a safe place to work. However, even if the question of what caused the flywheel to break had been the question before the jury, we think there would have been no objection to receiving the opinion of the witness upon the subject for that reason. "It is sometimes said that an opinion is not to be offered on 'the very issue before the jury,' but this, as once remarked (Snow v. R. Co., 65 Me. 231), would rather 'seem to be a very good reason for its admission.' If the witness can add instruction over and above what the jury are able to obtain from the data before them, it is no objection that he refers to the precise matter in issue, and if his opinion is superfluous it is inadmissible even if it concerns a matter not directly a part of the issue." Greenleaf on Evidence, vol. 1 (16th Ed.) p. 551.

[5] No objection was made to the qualifications of the witness as an expert, and the appellant now urges that the facts upon which the opinion was based should have been stated to the jury, so that the jury could judge as to the existence of such facts and be able to value the opinion accordingly, and that Downie in rendering his opinion really acted as one of the jury and usurped the functions of that body. The appellant quotes from several decisions in foreign jurisdictions to sustain his position. The precise question raised is carefully analyzed in volume 1, Greenleaf on Evidence (16th Ed.), at page 559. The statements there made seem to answer completely every argument of the appellant. It is pointed out that where a witness testifies by stating his inferences from facts not personally observed by him, it is necessary, for the sake of the jury in dealing with his testimony, that the data on which he bases his inference be specified by him and stated as assumed or hypothetical. It is also said that where the witness has personal observation of the facts upon which he bases his opinion, these facts can be stated by him upon his direct examination or upon his cross-examination as the observed facts upon which he bases his opinion. But if he has not had any personal observation of the facts and forms his opinion merely upon testimony listened to or upon other intimations of the facts, it would

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be impossible for the jury, merely from his statement of opinion, to know what were the data for the opinion. It would therefore be necessary for him, in stating his opinion, not only to specify the data for it (if this were all, it might be done by a question on cross-examination), but to specify them hypothetically, *i.e.*, as only assumed by him to exist. This is for the purpose of allowing the jury to reject the opinion as having no application to the facts of the case where the jury finds that the hypothetical facts upon which it is based do not exist. Thus, the necessity for stating the data hypothetically arises because the witness has no personal knowledge of them, and because it cannot be known, before the jury's retirement, what data they will find to be facts, and therefore what opinions are applicable to the case as found by the jury.

The argument made by appellant that the witness in stating his opinion based upon the facts which he had observed was "usurping the functions of the jury" is discussed by the author of the standard work on Evidence above mentioned. He points out that this objection, which has been frequently urged, has no foundation whatever, as the court does not empower the expert witness to decide any facts, nor is the jury bound to accept his assertion.

The class of cases (from jurisdictions other than California) from which appellant quotes to support his contention is not overlooked by Mr. Greenleaf. In regard to them, we have the following language, which seems so peculiarly applicable to the present case that we have thought it proper to quote it here:

"As a matter of academic nicety, it might be thought to follow what even a witness speaking from personal observation might be required to specify the data for the opinion he founds on his observation; and to this extent a few rulings have gone. But in such a case the direct examination or the cross-examination sufficiently brings out the data that serve to found the opinion on; and it may be taken as a proper deduction of principle that the hypothetical statement of the data need not be made except by witnesses not having personal observation of the data for their opinion."

The witness Downie had personally observed the facts connected with the operation of the engine on the day of the accident; he had been working upon it all day and up to a few moments of the accident; he had been making similar tests of engines for the defendant company for about a month before the accident. He had testified quite fully as to all facts connected with the operation and testing of the engine, and both upon his direct examination and upon his cross-examination the facts appear upon which he must have based his opinion. If there are any which do not appear, the defendant might have brought them out upon cross-examination, and if it failed to do so, it may not complain.

In the case of People v. Le Doux, 155 Cal. 535, 102 Pac. 517, relied upon by appellant in its brief, the expert witness whose opinion was asked had made no personal observation of the facts. Necessarily, his opinion would have to be based upon hypothetical facts which should have been stated by him. In the case of Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac 43 (the only other California case cited by appellant), the expert witness was asked his opinion of the value of certain stock, and the court held this to be error because "there were no facts stated, either real or hypothetical, as a basis for an intelligent opinion." This statement is clearly not applicable to the case at bar.

We find no error in the record, and the judgment is therefore affirmed.

We concur: Brittain, J.; Haven, J.

On Hearing in Supreme Court.

PER CURIAM. [6, 7] In denying the application for a hearing in this court after decision in the District Court of Appeal of the First Appellate District, we deem it proper to say that the statement in the

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opinion of the District Court of Appeal, to the effect that no objection was made to the qualifications of the witness Downie as an expert, is, in our opinion, erroneous, as the objection "that the proper foundation had not been laid" fairly presented the question of the sufficiency of the evidence as to the expert qualifications of the witness. However, we are of the opinion that there was sufficient evidence as to such qualifications, and in so far as this ground was concerned the objection was properly overruled.

The application for hearing is denied.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

SECOND DISTRICT, DIVISION 1.

CALIFORNIA HIGHWAY COMMISSION OF DEPARTMENT OF ENGINEERING OF STATE OF CALIFORNIA

v.

INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA ET AL. (Civ. 2945.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—RELATION OF EMPLOYER AND EMPLOYEE—EVIDENCE.

Where deceased was fatally injured by the overturning of an automobile secured by the highway commission to transport him and another to the place where they, if acceptable to the foreman, would be employed, *held* deceased was not in the employ of the commission at the time of the injury, and his dependents were not entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Proceedings by Nettie H. McGillivray and others, for compensation for the death of George J. McGillivray, opposed by the California Highway Commission of Department of Engineering of the State of California. Compensation awarded, and the Highway Commission petitions for writ of review. Award annulled.

Daniel W. Burbank, of San Francisco (F. J. Creede, of San Francisco, of counsel), for petitioner.

Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. Upon a writ of review issued herein we are asked to annul an award of compensation made by the Industrial Accident Commission against the California Highway Commission and in favor of dependents of George J. McGillivray, deceased, who is alleged to have died as the result of injuries received while in the employ of the Highway Commission.

The facts are as follows: In May, 1918, petitioner was engaged in constructing highways some distance from the city of Los Angeles, where the office of its division superintendent, whose duties were the general supervision of the work in this division, was located. Each section

*Decision rendered, March 27, 1919. Rehearing denied by Supreme Court May 26, 1919. 181 Pac. Rep. 112.

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or job of work was in charge of a superintendent or foreman on the ground. In the month of May the Public Employment Bureau of Los Angeles, having received notice from the division superintendent's office that petitioner was in need of laborers, sent George J. McGillivray to the office of said superintendent, where he applied for work as a teamster, and was told by Mr. Swartz, then in charge of the office, that he could secure a job by applying to Mr. J. G. Beckjord, the foreman on the ground of what was known as the "Ridge Route," distant some 60 miles from Los Angeles, provided he was satisfactory to him. He was also informed as to compensation paid and the amount deducted therefrom as board for employees, who were required to furnish their own blankets, and told that transportation to the place would be furnished him, no charge for which would be made, provided he held his job for one month. For the purpose of conveying deceased and another to the work, the Highway Commission secured an automobile, the owner of which undertook, for hire, the transportation of the men to the place where they, if acceptable to the foreman, would be employed. On the way to the prospective work the automobile overturned, injuring McGillivray, as a result of which he died. In the employment of men for the work Swartz had no authority other than, when men were needed and finding those whom he thought would be acceptable to the foreman, to send them on to the work, telling them, as he did McGillivray, that they could secure a job provided they were satisfactory to the foreman; that as to men thus sent to him the foreman was vested with full authority, as in cases of independent application, to employ them or not, as he might determine. Indeed, as conclusively shown by the evidence, the only person who had the right to employ labor upon the work was the foreman in charge, who frequently refused to accept men sent him by the office, and that nothing was paid for time consumed in going from Los Angeles to the place of prospective employment.

Upon these facts, as to which there is no controversy, a majority of the commissioners found that McGillivray at the time he received the injuries which caused his death was an employee of petitioner, and that the injury arose out of and in the course of his employment as such employee. In our opinion, there is no evidence to support this finding. As appears from the facts, the relation of the Los Angeles office of petitioner to the foreman on the ground in charge of the work, having sole power to engage laborers, was identical with that of an employment office in finding work for those seeking employment. As was done in this case by Swartz, they are informed as to wages, terms, and conditions upon which, if satisfactory, employment may be obtained by applying to the person in charge of work at a designated place. But until such application is made, and the party accepted, the relation of employer and employee is not established. The information as to wages, terms, and conditions under which petitioner was employing men upon the Ridge Route, coupled with the statement made by Swartz that deceased could secure a job there if he proved satisfactory to the foreman in charge of the work, no doubt induced him to undertake the trip in the hope of obtaining employment; but, in the absence of proof that he applied to the foreman or entered upon service, it is insufficient to establish the relation of master and servant, without which compensation for injury or death cannot be awarded. Deceased knew that success in obtaining employment depended upon the foreman who, as shown by the uncontradicted evidence, was vested with full and arbitrary power in determining whom he would or would not employ. Hence, until he had reported to the foreman and there was some word or act on his part manifesting an acceptance of his proffered service, he could not be said to be an employee of the Highway Commission. Indeed, upon arriving at the camp and finding conditions unsatisfactory, he might, at his option, conclude that he would not apply for work. He was traveling upon his own time, for his own benefit, was not performing, and had never

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performed, any service for petitioner. The fact that he, instead of providing his own means of conveyance and cost of transportation, availed himself of the proffered offer of petitioner to advance the cost thereof, is an immaterial factor in the consideration of the question, since "the law operates upon a status, *i.e.*, that of employer and employee, and affixes certain rights and obligations to that status." North Alaska S. Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642. Since the status did not exist, the provisions of the Compensation Act are not applicable.

The award is annulled.

We concur: Conrey, P. J.; James, J.

SUPREME COURT OF COLORADO.

HELBURG

v.

TOWN OF LOUISVILLE ET AL. (No. 9383.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—CONSTRUCTION.

Recovery cannot be had for death of a police officer killed by persons whom he attempted to arrest, under Workmen's Compensation Act, which permits recovery for injuries not intentionally inflicted by another.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

Department 3.

Error to District Court, Boulder County; Robert G. Strong, Judge.

Proceedings for workmen's compensation by Mary Helburg, widow of Victor Helburg, in her own behalf, and in behalf of certain minor children, against the Town of Louisville, Colo., and the Industrial Commission of Colorado. Judgment for defendants, and plaintiff brings error. Affirmed.

Edward Affolter, of Louisville, and Edmund J. Churchill, of Denver, for plaintiff in error.

Leslie E. Hubbard, Atty. Gen., and John L. Schweigert, Asst. Atty. Gen. (Walter F. Schwed, of Denver, of Counsel), for defendant in error Industrial Commission.

ALLEN, J. Victor Helburg, a police officer of the town of Louisville, was killed by a person whom he undertook to arrest. The dependents of the deceased officer sought an award under the Workmen's Compensation Act. The Industrial Commission denied compensation upon the ground, among others, that the injury, upon which the claim was based, was one "intentionally inflicted by another," within the meaning of section 8 of the act (chapter 179, Session Laws 1915), which denies the right to compensation in cases where the injury is intentionally inflicted by a third person. This section was amended in 1917, but prior thereto, and at the time of the injury in question, provided that the following

*Decision rendered, May 5, 1919. 180 Pac. Rep. 751.

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condition, among others, must occur in order that the right to compensation shall obtain:

"Where the injury * * * is not intentionally self-inflicted or intentionally inflicted by another."

The claimants brought an action in the district court of Boulder county to vacate the findings and order of the commission. The district court having upheld the commission and confirmed its order, the claimants bring the cause here for review.

The plaintiffs in error, claimants before the commission, contend, in effect, that the above-quoted clause of section 8 of the statute of 1915 should not be literally construed, but that the words "injury intentionally inflicted by another" should be interpreted to refer only to an injury intentionally inflicted by another for reasons personal to the assailant, and not to relate to, or include, any injury which, although inflicted intentionally by a third person, was one caused by the employment, or arose as the result of a peril incident to the employment as in the instant case.

However much the construction contended for would result in harmonizing section 8 with the general purpose of the Workmen's Compensation Act, nevertheless the contention cannot be sustained. The clause and phrase in question is clear and explicit, and must be enforced according to its plain meaning. As said in Hause v. Rose, 6 Colo. 26:

"We cannot, as a court, supply omissions, nor make law to fit an exceptional case. * * * The statute, being explicit, does not admit of interpretation beyond its express letter, and must be administered as we find it."

For the above reason, the judgment is affirmed.

Affirmed.

Garrigues, C. J., and Bailey, J., concur.

SUPREME COURT OF ILLINOIS.

JAKUB

v.

INDUSTRIAL COMMISSION ET AL. (No. 12539.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW—NECESSITY OF REVIEW BY COMMISSION.

In proceeding under the Workmen's Compensation Act, the circuit court may review the record by certiorari under section 19, without the necessity of a review of the decision of the arbitrator by the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PRE-EXISTING DISEASE—CAUSE OF DEATH.

Under the Workmen's Compensation Act, compensation may be awarded, although there is a pre-existing disease, if the disease is aggravated and accelerated by an accidental injury in the course of employment, but there must be an accidental injury as the immediate or proximate cause of death.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

*Decision rendered, April 15, 1919. 123 N. E. Rep. 263.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"ACCIDENTAL INJURY."

An "accidental injury," within the Workmen's Compensation Act, is one which occurs in the course of the employment, unexpectedly, and without the affirmative act or design of the employee; it being something which is unforeseen and not expected by the person to whom it happens.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, Second Series, Accidental Injury.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACCIDENT AS CAUSE OF DEATH.

Where an employee engaged in baling scrap copper was found dead near the baling press, with a completed bale of copper beside him, and there was no evidence proving accident, or accidental injury, the claim being that the heavy work which deceased was doing hastened his death by heart and kidney disease, there could be no recovery.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding of Eudokia Jakub under the Workmen's Compensation Act for compensation for the death of her husband, John Jakub, opposed by J. Sandrovitz & Co., employer. Denial of award by an arbitrator was filed with the Industrial Commission, and became final as its decision. The finding was confirmed on ceritorari to the Circuit Court, and applicant brings error. Affirmed.

Isaac Landsberg, of Chicago, for plaintiff in error.

Truman Henry Miner, of Chicago (Alfred Roy Hulbert, of Chicago, of counsel), for defendant in error.

CARTWRIGHT, J. Plaintiff in error, Eudokia Jakub, applied to the Industrial Commission for compensation for the death of her husband, John Jakub, while in the employment of defendant in error, J. Sandrovitz & Co. An arbitrator found that Jakub did not sustain accidental injuries arising out of and in the course of his employment, and denied the application. The decision of the arbitrator was filed with the Industrial Commission, and became final as the decision of the commission. Plaintiff in error sued out a writ of certiorari from the circuit court of Cook county, and, a return being made by the commission, the court confirmed the finding, and certified that the case was one proper to be reviewed by this court.

[1] There was no application for a review by the Industrial Commission of the decision of the arbitrator, and the question is presented whether the circuit court had jurisdiction to review the decision. Section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144) provides that the decision of the arbitrator shall be filed with the Industrial Commission, which shall send to each party a copy of the decision, and, unless a petition for review is filed by either party within 15 days after the receipt by said party of a copy of the decision, then the decision shall become the decision of the Industrial Commission, acting within its powers, and of the arbitrator or committee of arbitration, where no review is had, and his or their decision becomes the decision of the Industrial Commission, shall, in the absence of fraud, be conclusive, unless reviewed as therein provided. The provision for such review is that the circuit court of the county where any of the parties defendant may be found shall, by writ of certiorari to the Industrial Commission, have power to review all questions of law presented by the record. Plaintiff in error did not avail herself of the statutory

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right to a review of the decision by the Industrial Commission and the privilege of introducing additional evidence upon such review, but permitted the decision of the arbitrator to become final as the decision of the Industrial Commission. By the statute the circuit court was given jurisdiction to review the record by certiorari without the necessity of a review of the decision of the arbitrator by the commission.

On the hearing before the arbitrator plaintiff in error proved the following facts: John Jakub was employed by defendant in error in baling loose pieces of copper in large bales, weighing from 900 to 1,500 pounds, by an electric baling press. He would put rags in the bottom of the press, and then put on the scrap copper and press it down, and repeat the process until there was enough for a bale, and would then release the power, open the press, bind the bale with wire, and take it off the press upon a truck and haul it away. The last that was known of him before his death, he was heard to call for more copper to put in the press. Very soon afterward he was found lying on the floor, with the bale, completed and wired, also on the floor, about two feet from him. He was still breathing, and died within a half hour. These facts being proved, defendant in error introduced the verdict of a coroner's jury, which was admitted without objection, and found that the deceased came to his death "from organic heart disease (marked chronic fibrous myocarditis) and kidney disease." In rebuttal the plaintiff in error offered the testimony of a physician, who said that after the coroner's autopsy he examined the heart, lungs, liver, kidneys, part of the intestines, and the stomach, and found in them acute hyperemia and the heart somewhat enlarged; that in case of organic heart disease there was hyperemia in other organs, and the heavy exertion of the work in which he was employed would hasten his death. Another physician testified that in the condition of the deceased the effort and exertion of his work would interfere with the heart action and cause more or less trouble, and finally cause death if the work were too heavy.

[2, 3] Compensation may be awarded, although there is a pre-existing disease, if the disease is aggravated and accelerated by an accidental injury in the course of employment. This rule was applied in Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651, where a fireman fell from the engine and suffered accidental injuries and a fracture of his skull. To bring a case within that rule, however, there must be an accidental injury as the immediate or proximate cause of death. The statute provides compensation for accidental injuries or death suffered in the course of the employment, and an injury to be accidental is one which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee. It is something which is unforeseen, and not expected by the person to whom it happens. Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N. E. 249.

[4] In this case there was no evidence tending to prove any accident or accidental injury to the deceased. There was no mark upon his person, and nothing from which it could be inferred that an accident had occurred, and it is not claimed that there was any accident, but only that the heavy work which he was doing in the ordinary course of his employment caused or hastened his death. The decision of the arbitrator was therefore right, and the circuit court did not err in confirming the decision.

The judgment is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

SEGGEBRUCH

v.

INDUSTRIAL COMMISSION ET AL. (No. 12585.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—HAZARDOUS EMPLOYMENT.

Where neither the employer nor employee had elected to come under the Workmen's Compensation Act, whether they were under that act depended upon nature of employment and the business engaged in at time of injury, and whether employee was injured in line of employment coming within purview of section 3, defining hazardous employments.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—HAZARDOUS EMPLOYMENT.

An individual engaged in farming and other business, who employed men without regular duties, and who had not elected under Workmen's Compensation Act, § 1, to come under the act, was not operating thereunder in respect to his farming, not within hazardous occupations enumerated in section 3, so that Industrial Commission had no jurisdiction to award compensation to an employee injured while hauling fertilizers.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PURPOSE.

The intention of Workmen's Compensation Act in specifying certain occupations as extrahazardous, and in depriving employer of certain defenses, was to secure to employees engaged in such occupations greater protection than was afforded by the pre-existing law.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

Error to Circuit Court, Will County; Dorrance Dibell, Judge.

Proceeding by Henry J. Luecke for an award of compensation under the Workmen's Compensation Act, opposed by William Seggebruch, employer. From a judgment of the circuit court affirming an award of the Industrial Commission in favor of claimant, the employer brings error. Reversed and remanded, with directions.

Bowles & Bowles, of Chicago, and O'Donnell, Donovan & Bray, of Joliet, for plaintiff in error.

Barr, McNaughton & Barr, of Springfield, for defendant in error.

STONE, J. The circuit court of Will county affirmed an award of the Industrial Commission in favor of defendant in error, Henry J. Luecke, for injuries received by him while in the employment of the plaintiff in error.

Defendant in error was injured on the 8th day of February, 1915, while engaged in hauling manure and refuse from the barn of the plaintiff in error to certain farm land owned and operated by plaintiff in error. It appears from the evidence before the arbitrator that at the time and prior to the day of the accident in question the plaintiff in error was

*Decision rendered, April 15, 1919. Rehearing denied June 6, 1919. 123 N. E. Rep. 276.

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engaged in farming, in conducting a retail flour and feed store, a saloon, a grain elevator, and in retailing sand, gravel, tile, and brick, in the village of Crete, Will county, Ill. The elevator was the usual grain elevator located near the railroad tracks, to which farmers hauled their grain over a dump, from which the grain was elevated to bins by machinery driven by an electric motor. The grain in the elevator was shipped out in cars, and part of the grain was hauled by teams from this elevator to Chicago Heights, a distance of about five miles, and part of the grain was hauled to a feed store operated by plaintiff in error at the village of Crete. Plaintiff in error owned and operated a farm of 117 acres about one mile from the village, and also owned a subdivision to the village of about 20 acres. The brick, tile, stone, gravel, and sand were handled direct from the cars on which they were shipped into Crete, or were sometimes unloaded onto the ground along the grain elevator switch track and hauled out by the farmers. Sometimes the gravel was hauled direct from the cars or the storage on the ground aforesaid direct to the public roads by the teams of the plaintiff in error. The accounting part of all business except the saloon was carried on in the office located at the feed and flour store. The plaintiff in error had four or five horses at the time of the accident. These horses were kept in the barn on the premises where the feed store and the residence of the plaintiff in error were located, and were used in connection with all of his aforesaid businesses. The manure from the barn was in a concrete bin adjoining the barn, and when the bin was full the men employed by plaintiff in error would haul it out to the farm and onto the land in the subdivision. On the day of the accident defendant in error was emptying the bin and hauling the contents thereof onto the subdivision with a team and wagon, and while unloading the manure he was either thrown or fell from the wagon and was badly injured. He was sent to the hospital at Chicago Heights, where he remained for several months, and at which place one leg was amputated because of the condition produced by the injury.

Several men were employed by the plaintiff in error, none of whom, including the defendant in error, had any regular duty. Defendant in error did every kind of work for the plaintiff in error except office work. Sometimes he worked at the elevator, at which time he stopped and started the machinery; at other times he worked in connection with the gravel, sand, brick, and tile, unloading or hauling the same from the car; at other times he hauled grain from the elevator to Chicago Heights; at other times he hauled flour and feed to the store buildings at Crete; at other times he worked on the farm during the farming season. Defendant in error testified that he took care of the teams; that he did not know the character of the work he did the day before the accident. On cross-examination he stated that he was hauling manure for fertilizer; that he had hauled the same that year to other places; that he worked the land for plaintiff in error during the proper season; that on the day of the accident he hauled manure because he did not have any other work on hand; that the elevator was used in the fall when grain came in; that he did not know whether or not he worked in the elevator during the month of February in which he was injured.

The Industrial Commission found that defendant in error and plaintiff in error were operating under, and were subject to the terms and provisions of, the Workmen's Compensation Act (Laws 1913, p. 335); that the injury of the defendant in error was an accidental injury arising out of and in the course of his employment; that the applicant sustained temporary total disability for a period of 24 weeks and the loss of one leg; that medical and hospital services were furnished by the plaintiff in error to the extent of $40; and that applicant had expended in addition thereto $160 during a period of eight weeks after the accident. The commission allowed an award of $6 per week for 24 weeks, and a further award of $6 per week for 175 weeks and said amount of $160. Plaintiff in error filed his petition for a writ of certiorari in the circuit court of Will county, and that court affirmed the award and quashed the writ.

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[1] The only contention of the plaintiff in error is that the court erred in affirming the award, for the reason that the plaintiff in error was not under the provisions of the Workmen's Compensation Act either by election or by virtue of the hazardous nature of his business or employment. It is admitted that neither the employer nor employee had elected to come under the provisions of said act. Whether or not the parties hereto were under the Workmen's Compensation Act depends upon the nature of the employment and the business engaged in at the time of the injury. It is evident plaintiff in error followed a varied line of business, and the test is whether or not the defendant in error was at the time he was injured working in a line of employment which comes within the purview of section 3 of the Workmen's Compensation Act. Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713.

[2, 3] It is urged by defendant in error that plaintiff in error was engaged in conducting an elevator business, and that such elevator business is a hazardous occupation. It was said in Vaughan's Seed Store case, supra:

"The reasonable interpretation of paragraph (b) of section 3 is that the provisions of paragraph (a) shall only apply to an employer engaged in the extrahazardous occupations mentioned, * * * and it was not intended that employers engaged in such extrahazardous occupations should for that reason by subject to any greater liability to their employees not engaged in such occupations than other employers under the same circumstances. The defendant in error was not an employer of the plaintiff in error in any of the extrahazardous occupations mentioned in section 3, and plaintiff in error was not exposed to any of the dangers arising from such extrahazardous occupations. Whether or not the defendant in error, as to any part of its business, was subject to the provisions of the Workmen's Compensation Act, it was not subject to such provisions so far as the plaintiff in error was concerned."

The defendant in error, as appears from the record, was at the time of his injury engaged in the spreading of fertilizer over certain farm land of the plaintiff in error. This occupation was that of farming—a business not included within paragraph (b) of section 3 of the Workmen's Compensation Act. In the case of Fruit v. Industrial Board, 284 Ill. 154, 119 N. E. 931, the employer was engaged in the retail coal business and the employee was injured while employed in that business. It was urged that because of the fact that the employer conducted also the business of delivering goods for a wholesale house he was thereby brought under paragraph (b), § 3, of the act as a carrier. This court there held that whether or not he had at times engaged in the business of delivering goods for others was immaterial, as the employee was, at the time he was injured or employed, not working in that line of employment or in doing anything connected therewith.

By section 1 of the Workmen's Compensation Act any employer is authorized to elect to provide and pay compensation for accidental injuries to his employees arising out of and in the course of the employment. He is not, however, required by the act, under that section, to pay such compensation, as such payments are entirely voluntary. If he does not so elect, he remains subject to the same liabilities and may make the same defenses as before the passage of the act. Section 3 limits this right of election, as that section presumes that all employers engaged in the different occupations or businesses therein specified have elected to come under the act in case such employers do not act concerning an election, and if they do elect not to come under the act they surrender the right to introduce the defenses of assumed risk, negligence of fellow servants, and contributory negligence. The intention and purpose of the Workmen's Compensation Act in specifying certain occupations as extrahazardous, and in depriving the employer of the right of said defenses thereto, is to secure to the employees engaged in such extrahazardous occupations

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a greater degree of protection than was afforded by the law previous to the enactment of that act. It was not the purpose to extend the provisions of the act to occupations not having any connection with the extrahazardous occupations mentioned in section 3. To hold otherwise would be to hold that said section 3 applies to all occupations, and that all employers come under the act, regardless of whether or not they had elected to do so. The fact that the defendant in error here did at times operate the machinery of the elevator does not aid his contention, for the reason that he was not engaged in that occupation at the time of his injury, nor was he engaged in any occupation incident thereto, and had not been during the month in which he was injured. The fact, if it be a fact, that his employer would at times engage in occupations coming within section 2 is of no avail here, where the injury of the employee did not arise out of or in the course of his employment at such hazardous occupation or any occupation incident thereto. Fruit v. Industrial Board, supra; Vaughan's Seed Store v. Simonini, supra; Hochspeier v. Industrial Board, 278 Ill. 523, 116 N. E. 121, L. R. A. 1918F, 227.

As the defendant in error was not engaged in any occupation referred to in section 3, and there was no election on his part or on the part of the employer to come under the Compensation Act, it follows that they were not operating under said act, and that the Industrial Commission was without jurisdiction to award the compensation in this case, and the circuit court erred in affirming the award and quashing the writ of certiorari.

It is urged by the defendant in error, on cross-errors, that the circuit court should have stricken from the record the testimony taken before the Industrial Commission, but not heard by the board of arbitrators, for the reason that the transcript of said testimony taken on review was not filed within the time prescribed by the act. As it appears from the testimony taken before the board of arbitrators that the defendant in error was not engaged in an extrahazardous occupation, and was not therefore within the purview of the Compensation Act, which facts are not in any way changed by the testimony taken before the commission on review, it does not become material here to decide whether or not the transcript of said testimony taken on review was properly preserved or filed in apt time.

The judgment of the circuit court will therefore be reversed, and the cause remanded to said court, with directions to set aside the findings of said commission and quash the record.

Reversed and remanded with directions.

SUPREME COURT OF ILLINOIS.

CHICAGO R. I. & P. RY. CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12511.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF EMPLOYMENT"—HOMICIDE.

Where a locomotive boiler washer's helper quit work, and thereby obliged the boiler washer to apply to the foreman for another helper,

*Decision rendered, April 15, 1919. Rehearing denied June 5, 1919. 123 N. E. Rep. 278.

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which angered the first helper, who in the ensuing quarrel shot the boiler washer, the shooting was incidental to, and arose out of, the employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. COMMERCE—RAILROAD EMPLOYEES—"INTERSTATE COMMERCE."

A locomotive boiler washer shot and killed by another employee of defendant while engaged in washing a boiler on a locomotive, not assigned to any particular train or work, but standing in defendant's yards ready to be assigned to either intrastate or interstate commerce, is not engaged in interstate commerce, so as to prevent recovery under the Workmen's Compensation Act.

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

Cartwright and Dunn, JJ., dissenting.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Katherine Kraujalis for compensation for the death of Alexander Kraujalis, opposed by the Chicago, Rock Island & Pacific Railway Company, employer. An award of compensation was made by the Industrial Commission, confirmed by the circuit court, and certified to the Supreme Court for review by writ of error. Affirmed.

M. L. Bell and A. B. Enoch, both of Chicago, for plaintiff in error.

John L. Hopkins and A. G. Abbott, both of Chicago, for defendant in error.

FARMER, J. Alexander Kraujalis was employed by the Chicago, Rock Island & Pacific Railway Company in its yards at Blue Island as a locomotive boiler washer. While engaged in work he was shot and killed in the roundhouse of the railroad company by another employee of the company, who was known as a machinist's helper, and was employed by the same company. The killing occurred Monday night, November 19, 1917. Kraujalis left surviving him a wife and two children, and application was made for compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i); it being claimed that the death occurred in the course of and arose out of the employment of deceased.

Kraujalis was, as we have said, a locomotive boiler washer, and for some months his assistant or helper in that work was his brother-in-law, Kaupus. Saturday night, November 17th, Kaupus was not on duty, and Hunt, a machinist helper, was assigned to the duty of assisting deceased in the work. Through the week machinist helpers were let off at 11:30 p. m., and on Saturday night at 10:30 p. m. Saturday night, November 17th, Hunt quit and left his work about 10 o'clock p. m., and deceased was left without any helper. Kraujalis reported that fact to the foreman, Dan Dougherty, and the foreman directed him to get a Mexican to help him the rest of the night. Monday night, November 19th, Kaupus was assisting Kraujalis as his helper, and Hunt was at work as a helper to a machinist named Deady. About 7 o'clock p. m. the deceased went to the storehouse for some oil, and about the same time Hunt was sent by Deady to the same storehouse for some cotter-keys. The two men met in the storehouse and a quarrel ensued. Hunt called deceased a vile name, and they engaged in a fight. Kraujalis threw Hunt down and held him for some minutes. Hunt pleaded with him to be allowed to get up, which Kraujalis permitted him to do, and when he arose he struck Kraujalis on the jaw and "put him out." Kraujalis called for his brother-in-law, Kaupus,

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who came to the storehouse and threw Hunt out. He testified Hunt said Kraujalis had reported him to the boss and that if he was fired he would kill Kraujalis. Immediately afterwards Kraujalis and Kaupus went to the office of Dougherty, the foreman, and reported that Hunt was fighting them. Hunt had returned to the place of work, and Dougherty and the two men went to where Hunt was engaged, and Dougherty called for Hunt. He came to where the men were, and there struck, or tried to strike, Kaupus with a sledge hammer. In some manner the sledge hammer got out of Hunt's hands, and Kaupus testified he then tried to grab him in the breast. About that time another employee came by with a hose on his shoulder, and Kaupus took the hose and struck Hunt with the end of it, on which was a metal tip. The blow staggered Hunt, and when he recovered he ran or went away. Kraujalis and Kaupus went back to the engine they were washing out. Kaupus turned the water on, and Kraujalis was handling and directing the hose. While they were thus engaged, Hunt came with a revolver and began shooting at Kaupus. One bullet passed through Kaupus's shirt, and he ran away. Hunt then shot Kraujalis, wounding him so severely that he died.

The above is the substance of the material testimony as to how the death occurred. The arbitrator before whom the application for compensation was heard denied compensation. A petition for a review was filed before the Industrial Commission, and upon the hearing the commission awarded compensation to the applicant. The award was confirmed by the circuit court of Cook county, and that court certified the cause was a proper one to be reviewed by the Supreme Court. Accordingly the case is before us by writ of error.

A reversal is asked by the plaintiff in error upon two grounds: (1) The injury to deceased which caused his death did not arise out of his employment; (2) both deceased and Hunt were engaged in interstate commerce at the time of the shooting, and no award can therefore be made under the state Compensation Act.

The determination of the question whether an injury arose out of the employment in some cases presents one of the most difficult problems in connection with the act. Glass on Workmen's Compensation, 40. This Court has in several cases adopted the definition of the Supreme Court of Massachusetts in the McNicol Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, viz.:

"It [the injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment."

See Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808.

[1] Kraujalis was not the superior of Hunt in the sense that he had authority to discharge him, but his (Kraujalis') work was such that he could not perform it without the assistance of a helper. When the helper quit work before the work was completed, it was his duty to ask the foreman for help, which made it necessary for him to inform the foreman his helper has quit work. It was the performance of his duty that aroused the anger of Hunt and caused him to quarrel and fight with Kraujalis. It does not appear that Kraujalis at any time was the aggressor or sought an altercation with Hunt. The meeting of the two men at the storehouse the night of the shooting was accidental. Hunt had learned Kraujalis had reported to the foreman that Hunt had quit work Saturday night before quitting time and began abusing Kraujalis and called him an offensively vile name. They engaged in a fight, but

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Kraujalis, who was the larger man, does not appear to have done anything more than throw Hunt down and hold him until he pleaded to be allowed to get up. This Kraujalis permitted him to do, and he then struck Kraujalis on the jaw—a blow which a witness said "put him out." It was also testified Hunt there said Kraujalis had reported him, and if he was discharged he would kill him. When Kraujalis and his helper, Kaupus, went with the foreman to the place where Hunt was at work, Hunt was the aggressor, according to the testimony, and sought to strike Kaupus with a sledge hammer. It is not shown by the testimony that Kraujalis there said or did anything. After Kraujalis and Kaupus had returned to and were engaged in the duties of their employment, Hunt came to them with a revolver and began shooting at Kaupus. When he ran away he then turned on and shot Kraujalis, who was holding and directing the hose in washing out the boiler. The shooting was incidental to, and arose out of, the employment. It cannot be said, as a matter of law, that the injury was such a one as might happen to any one and did not arise out of the employment. "It [the risk of injury] may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected" therewith. Bryant v. Fissel, 84 N. J. Law, 72, 86 Atl. 458. There was a causal connection between the conditions under which Kraujalis was required to perform his work and the injury. It cannot be said that the proof does not tend to show that the shooting of Kraujalis was caused by his report to the foreman that Hunt had quit work. This the nature of his work required him to do, as he was obliged to ask the foreman for another helper. He was acting entirely in the line of his duties, and this brought upon him the murderous assault by Hunt with a gun. That such an attack is an unusual and extraordinary result makes it none the less an incident of the employment. There is no dispute that Kraujalis was shot in the course of his employment, and we cannot say the Industrial Commission and the circuit court erred in finding the injury arose out of the employment, and this conclusion is sustained, in principle, by Trim School District v. Kelly, 7 B. W. C. C. 274, where the teacher was assaulted and killed by bad and unruly pupils. Polar Ice and Fuel Co. v. Mulray (Ind. App.) 119 N. E. 149; In re Heitz, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344.

It was stipulated at the hearing that plaintiff in error was engaged in both interstate and intrastate commerce. There was a division point on plaintiff in error's road after leaving Blue Island, at Silvis, Ill., a city of about 3,000 population, about eight miles east of the Iowa line. The engines which hauled interstate trains to Silvis hauled interstate trains coming from the west from Silvis to Chicago. The proof tends to show that there were five engines in the roundhouse at Blue Island that were used principally for interstate trains, and it is claimed the engine Kraujalis was working on when shot was one of them. Its number was 2008. The road foreman of equipment testified there was no written order assigning engines to different trains; that if the exigencies required it they would not let an engine lie idle, but would use it on any train when for the benefit or advantage of the company. It was the duty of the foreman to assign the power. At times engine 2008 was used in intrastate service. At the time Kraujalis was at work on the engine it had not been assigned to any particular train. In Minneapolis & St. Louis Railroad Co. v. Winter, 242 U. S. 353, 37 Sup. Ct. 170. 61 L. Ed. 358, Ann. Cas. 1918B, 54, it was alleged in the declaration that the plaintiff, when injured, was making repairs on an engine, and that the parties were engaged in interstate commerce. It was stipulated that the engine had been used in hauling freight trains over defendant's lines, which freight trains carried both intrastate and interstate commerce, and was so used after the plaintiff's injury. The court said:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not perma-

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nently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business, and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

[2] That decision appears to us conclusive of the contention of plaintiff in error that the parties were at the time of the injury engaged in interstate commerce.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Cartwright and Dunn, JJ., dissenting.

SUPREME COURT OF ILLINOIS.

SWIFT & CO

v.

INDUSTRIAL COMMISSION ET AL. (No. 12533.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF COMMISSION—CONCLUSIVENESS.

Under Workmen's Compensation Act, § 24, when the facts and circumstances of the accident were known to employer or his agent, and where the commission found that the notice was in fact given, and the finding is supported by competent evidence, it is conclusive upon appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DUTY OF COMMISSION TO APPORTION AWARD.

Under Workmen's Compensation Act, § 7, as amended in 1915, the commission was not required to apportion compensation between a widow and a child in proceeding by the employee for an award, carried to completion by the widow as his administratrix after employee's decease; there being no contest as to who should receive the benefit of the award.

(For other cases, see Master and Servant, Dec. Dig. § 386[5].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DUTY OF COMMISSION TO APPORTION AWARD.

Workmen's Compensation Act, §§ 7, 21, providing for determination by the Industrial Commission of the proportionate share of each beneficiary, does not require that the commission shall determine how much or what proportion of the compensation every member of the class may receive.

(For other cases, see Master and Servant, Dec. Dig. § 386[5].)

*Decision rendered, April 15, 1919. Rehearing denied June 5, 1919. 123 N. E. Rep. 267.

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4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXPENSE OF PHYSICIAN—EMPLOYEE'S ELECTION TO PAY PHYSICIAN.

In view of Workmen's Compensation Act, providing that the employer shall provide necessary medical treatment for a period not longer than eight weeks, an injured employee's selection of a physician other than one of the staff maintained by employer was an election to secure his own physician, and under section 8 he must be held to have elected to do so at his own expense, and it was not error for circuit court to strike from an award a sum allowed therefor.

(For other cases, see Master and Servant, Dec. Dig. § 385[16].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Beatrice Kucinski, administratrix, against Swift & Co., employer. Award was made by the Industrial Commission, and from a judgment affirming the award, after striking from the same a certain sum awarded for medical services, the employer brings error, and the administratrix, defendant in error, assigns cross-errors. Affirmed.

T. M. Coen, of Chicago, for plaintiff in error.
Charles W. Lamborn, of Chicago, for defendants in error.

STONE, J. The circuit court of Cook county affirmed the award of the Industrial Commission in favor of the defendant in error, Beatrice Kucinski, administratrix of the estate of Tony Kucinski, deceased, for injuries received by him while in the employ of the plaintiff in error, and from which it is claimed he subsequently died.

Tony Kucinski was at the time of his death 28 years of age, and for a number of years, with short intervals of absence, was in the employ of the plaintiff in error. His last employment was for about one year. It appears from the evidence that the alleged accident occurred on or about September 10, 1915. While the deceased was pushing a truck loaded with boxes and cases he slipped and fell, and some of the cases fell upon him, striking him in the region of the back and hip. It appears that he left the employment of the plaintiff in error about 4 weeks after the injury. For a time after that he was able to be about and walk with the aid of a cane and had some medical treatment. On December 27th following he was taken to the Michael Rees Hospital, where upon examination his hip was found to be infected with incipient tuberculosis, and an operation was performed for the removal of an abscess. On February 24, 1916, a more advanced tubercular hip condition was found. Thereafter it was discovered that his lungs were tubercular. About May of the same year he was taken to the Cook County Hospital, and died the following August of pulmonary tuberculosis. Application for the adjustment of this claim was filed February 25, 1916. The testimony of deceased was taken in the Cook County Hospital on the 11th day of May, 1916. Beatrice Kucinski, his widow, was appointed administratrix of his estate, and appears as defendant in error here.

It appears from the evidence that prior to the injury deceased had enjoyed good health; that he had never had any trouble with his hip or leg and had never limped or suffered from rheumatism. The testimony of attending physicians tends to show that the appearance of tubercular infection at the hip was caused by the blow received by the deceased in the accident in question, and that the infection later spread to his lungs, causing death. It does not appear to be urged by the plaintiff in error that the accident was not the cause of death.

The commission found as a fact that both the deceased and the respondent were working under and subject to the Workmen's Compensation Act of Illinois (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) that

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the deceased did on the 10th day of September sustain an accidental injury which arose out of and in the course of the employment; that the respondent had notice of the accident, and that claim was made within the time prescribed by law; that the deceased died as a result of the accidental injury; that respondent is liable for hospital and medical services to the amount of $150, in addition to compensation of $6.50 per week for a period of 416 weeks. The circuit court affirmed the award after striking from the same the sum of $150 awarded for medical services.

It is contended by the plaintiff in error that no notice was given of the alleged accident within 30 days thereafter, as required by the Compensation Act; that, since the deceased is survived by a widow and a minor child, it is error to award compensation to the administratrix of the estate of the deceased, such right to compensation being an independent right vested in the dependents of the deceased; that, the commission having held compensation was due to the representative of the estate, it was error to refuse to determine the relative interests of the surviving dependents in such and to apportion the same between the dependents upon demand and request of plaintiff in error on the hearing before the Industrial Commission. Cross-errors are assigned by the defendant in error averring that the court erred in striking from the award of the Industrial Commission the sum of $150 for medical services.

[1] Concerning the contention of plaintiff in error that no notice of the injury was given, as required by section 24 of the Workmen's Compensation Act, the record shows that the deceased testified concerning the manner of his injury, and that immediately after the injury he told Joe Lukidc, a foreman of plaintiff in error, that he had been injured and how it happened; that he was sent to the company doctor, who examined his hip, applied medicine of some sort, and told him that he would be all right by the next day; that he returned to work, but that the pain increased for 3 or 4 weeks, at the end of which time he told Lukidc that his hip hurt him so much that unless he could get easier work he would have to quit; and that Lukidc told him there was no other job for him and that he should go home and stay there until he was ready to come back. Section 24 of the Workmen's Compensation Act provides, among other things, that notice of the injury shall be given within 30 days, with certain exceptions, and further provides "that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice principal in the enterprise." The commission found that notice of the injury was, in fact, given as required by statute. There is evidence in the record tending to prove that deceased notified Lukidc, who the deceased testified was plaintiff in error's foreman, of the injury shortly after its occurrence. While it is earnestly urged that Lukidc was not a foreman of the plaintiff in error, it is not the province of this court to weigh the testimony on that point. As has been repeatedly held by this court, where there is competent evidence before the commission fairly tending to prove a fact, the finding of that fact by the commission precludes its review here. Smith-Lohr Coal Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231; Big Muddy Coal Co. v. Industrial Board, 279 Ill. 235, 116 N. E. 662; Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834. As the foreman was the agent of the plaintiff in error, it follows that section 24, regarding notice, has been complied with. Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976.

[2] Plaintiff in error's second contention is that the court erred in affirming an award of compensation to the administratrix while the evidence shows that the widow and a child survived; that, while compensation for disability prior to death is payable to the administrator, com-

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pensation on account of death is payable to the dependents; that it was not only the duty of the commission to award the compensation to the dependents, but it was incumbent upon it to apportion the compensation between the widow and child.

Section 7 of the Compensation Act, as amended in 1915, provides as follows:

"The amount of compensation which shall be paid for an injury to the employee resulting in death shall be: (a) If the employee leaves any widow, child or children whom he was under legal obligation to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than one thousand six hundred fifty dollars and not more in any event than three thousand five hundred dollars. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death."

Paragraph (f) of said section 7 provides as follows:

"The compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of the deceased employee or to his beneficiaries, and shall be distributed to the heirs who formed the basis for determining the amount of compensation to be paid by the employer, the distributees' share to be in the proportion of their respective dependency at the time of the injury on the earnings of the deceased: Provided, that, in the judgment of the court appointing the personal representative, a child's distributive share may be paid to the parent for the support of the child. The payment of compensation by the employer to the personal representative of the deceased employee shall relieve him of all obligations as to the distribution of such compensation so paid. The distribution by the personal representative of the compensation paid to him by the employer shall be made pursuant to the order of the court appointing him." Laws 1915, p. 402.

In support of his contention that the Industrial Commission should apportion the amounts due to the several beneficiaries, counsel for plaintiff in error cites Smith-Lohr Coal Co. v. Industrial Com., supra. The question decided in that case arose by reason of a contest between the widow and the parents of the deceased as to who was entitled to the compensation, and this court in that case held:

"The statute as to distribution of the amount paid by the employer to the personal representative of the deceased applies only in cases where the employer voluntarily pays the compensation to the personal representative of the deceased without a hearing and determination before an arbitrator or the Industrial Commission. If the compensation is fixed by the Industrial Commission, it is required to determine who is entitled to the compensation before it can determine the amount. * * * The fact that the claimants were the persons described in paragraphs (a) and (b), under which paragraphs the amount of the compensation provided is the same, could not operate to relieve the Industrial Commission from the duty of determining the person or persons who were entitled to the compensation. We do not construe the statute in such cases as this to leave it to the probate court to determine who is entitled to the award made by the Industrial Commission."

In the case at bar there is no contest as to who shall receive the benefit of the award, and the rule laid down in the Smith-Lohr Coal Co. Case on that point has no application here.

[3] It is also contended that, in view of the proviso in section 21 of the Compensation Act providing for the reduction of compensation in the event of the death of the beneficiary before the completion of the compensation payments, it is necessary to determine what the relative interests of the widow and child are in the compensation, so that, in the event of the death of either, the payments of compensation, so far as the

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deceased beneficiary is concerned, can be determined, and the employer not subject to a judgment and execution for the entire amount. Section 21, as amended in 1915, provides in this regard as follows:

"Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment: Provided, that, upon the death of a beneficiary, who is receiving compensation provided for in section 7, leaving surviving a parent, sister or brother of the deceased employee, at a time of his death dependent upon him for support, who were receiving from such beneficiary a contribution to support, then that proportion of the compensation of the beneficiary which would have been paid but for the death of the beneficiary, but in no event exceeding said unpaid compensation, which the contribution of the beneficiary to the dependent's support within one year prior to the death of the beneficiary bears to the compensation of the beneficiary within that year, shall be continued for the benefit of such dependents, notwithstanding the death of the beneficiary."

The proviso in section 21 applies to those cases where the beneficiary receiving compensation provided for in section 7 dies leaving surviving a parent, sister, or brother of the deceased employee who was at the time of his death dependent upon the said deceased employee for support and who was receiving from such beneficiary a contribution towards support. In this case the only beneficiaries are the widow and a child, whose compensation is payable under paragraph (a) of section 7. The death of either of these beneficiaries would not leave surviving "a parent, sister or brother of the deceased employee"; hence it follows that the proviso in section 21 has no application to compensation awarded under paragraph (a) of section 7. As we understand paragraphs (a) and (f) of section 7, they do not provide for determination by the Industrial Commission of the proportionate share which each beneficiary is entitled to receive where the beneficiaries are all of the class specified in paragraph (a) of said section, although, as was held in the Smith-Lohr Coal Co. Case, the commission must, in order to determine the total amount of compensation, determine who is entitled to receive the same. That case does not, however, hold that it is incumbent upon the commission to determine how much or what proportion of the compensation every member of the class may receive. As was said by this court in the case of Wangler Boiler & Sheet Metal Works Co. v. Industrial Com., 287 Ill. 118, 122 N. E. 366:

"Compensation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary, but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensaation, when determined according to law, is no less a vested right, and one that can be affected only by the act of the Legislature that gave it. Hansen v. Brann & Stewart Co., 90 N. J. Law, 444, 103 Atl. 696. The intention of the Legislature to so treat that right is shown by section 9 of the act, which, as we have seen, provides that where a lump sum settlement is awarded by the Industrial Board in case of an injury resulting in death, there is no right of rejection either by the employer or beneficiary. The intention of the Legislature that such right shall be a vested right is further shown by paragraph (g) of section 19 of the act, which provides for judgment in the circuit court on an award where there is a refusal or failure to pay the compensation; such judgment being treated as similar to an execution. Friedman Mfg. Co. v. Industrial Com., 284 Ill. 554, 120 N. E. 460."

By paragraph (a) of section 7 the employer becomes liable, at all events, to pay a sum equal to four times the average earnings of the employee, within the limitations there prescribed as to amount, and, as we view the provisions of section 21 of the act, the Legislature did not intend that its provisions regarding reduction of compensation should

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apply to cases enumerated in said paragraph. The commission therefore did not err in making the award without determining the amount to which each beneficiary is entitled.

[4] It is urged by cross-errors assigned by defendant in error that the circuit court erred in striking from the award the sum of $150 for medical services. There is no evidence as to what medical expenses were incurred by the deceased prior to February 24, 1916. The award of the Industrial Commission relative to the amount for medical services is based upon the testimony of Dr. Mueller for his services between the 24th day of February and the 1st day of April following, in the year 1916. The services were not rendered within eight weeks of the date of the alleged accident, to wit, September 10, 1915, or within eight weeks of the first day of disability. The deceased was evidently under treatment prior to February 24th. The services of Dr. Mueller were rendered at the request of the deceased. Section 8a of the statute in question, relative to medical and hospital services in case of injury not resulting in death, as amended in 1915, is is follows:

"The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of $200. The employee may elect to secure his own physician, surgeon or hospital services at his own expense."

There is no evidence in the record tending to show that the deceased requested plaintiff in error to supply medical services, other than the letter of his attorney on February 24, 1916, to plaintiff in error, stating that he assumed that plaintiff in error would assume all obligations of the Workmen's Compensation Act. Plaintiff in error maintains a staff of physicians. The testimony of deceased showed that he was familiar with that fact, yet he chose other medical aid in the treatment he received prior to February 24th and subsequent to the day of the injury, when the evidence shows he went to the company doctor. His selection of Dr. Mueller on February 24th was an election to secure his own physician, and under section 8 he must be held to have elected to do so at his own expense. The circuit court did not err in striking the sum of $150 from said award.

No reversible error appearing in the record, the judgment of the circuit court will be affirmed.

Judgment affirmed.

Cartwright, J., took no part in this decision.

SUPREME COURT OF ILLINOIS.

WISCONSIN STEEL CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12331.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF EMPLOYMENT—EVIDENCE.

Evidence, in a proceeding for compensation for drowning of one employed as a pipe fitter about furnaces in the houses on a slip connecting

*Decision rendered, April 15, 1919. Rehearing denied June 5, 1919. 123 N. E. Rep. 295.

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with a river, *held* not to warrant a conclusion that the accident arose out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF EMPLOYMENT—BURDEN OF PROOF.

The burden is on an applicant to prove that the accident arose out of the employment by direct and positive evidence, or by evidence from which such inference can be fairly drawn, and without being based on a mere conjecture or surmise.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Carter, J., dissenting.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding before the Industrial Board by Josephine Karczewski, administratrix of Felix Karczewski, to recover compensation under the Workmen's Compensation Act, opposed by Wisconsin Steel Company, employer. From a judgment of the circuit court, on certiorari, affirming the finding of the Industrial Commission in favor of administratrix, the employer brings error. Reversed and remanded, with directions to the circuit court to set aside the award.

David A. Orebaugh, of Chicago (Edgar A. Bancroft, of Chicago, of counsel), for plaintiff in error.

T. A. Sheehan, of Chicago, for defendant in error.

FARMER, J. This was a proceeding before the Industrial Board by Josephine Karczewski, administratrix of the estate of her deceased husband, Felix Karczewski, to recover compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48 §§ 126-152i) on account of the drowning of her husband, who was in his lifetime an employee of the Wisconsin Steel Company, plaintiff in error. The Industrial Commission found in favor of the administratrix and entered a finding accordingly. The cause was taken to the circuit court of Cook county by certiorari, and the finding of the commission was affirmed. The trial judge certified that the case was one proper to be reviewed by this court, and the cause is here on writ of error.

Plaintiff in error owns and operates a large steel plant covering considerable ground in South Chicago, Ill. Among its buildings are three casthouses, in which are located furnaces known as Nos. 1, 2, and A, and a storehouse in which the tools for making repairs are kept. The Calumet river runs in a northeasterly and southwesterly direction easterly of the casthouses, and a slip has been made from the Calumet river south of the casthouses, extending east and west about 1,000 feet. Furnace A and its accompanying casthouse is situated nearest to and immediately north of the center of the slip. Furnaces Nos. 1 and 2 and their accompanying casthouses are northeast of furnace A, No. 1 lying east of No. 2, and the storehouse is located several hundred feet northeast of furnace No. 1, near the westerly bank of the Calumet river. The casthouse containing furnace A was about 75 or 100 feet north of the slip. The casthouse containing furnace No. 1 was some 400 feet north of said slip. Felix Karczewski (usually called Joe Pelka and who will be so called in this opinion) had been employed for several years by the plaintiff in error as a pipefitter. Each blast furnace consists of the furnace proper and the stove. There are two or more stoves for each furnace. The combustible gases from the top of the furnace are carried off through one of them and the flues of the stove thus heated to an intense heat. The gas is then turned into the other stove, and the blast is blown through the

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heated stove and enters the furnace at a very high temperature. Thus each stove is alternately being heated by combustible gases from the top of the furnace and being used to heat the air which is blown into the bottom of the furnace. When a blast is in progress, the heat around the outside of the furnace, near its base, ranges from 140° to 150° Fahrenheit. Besides the pipes or conduits through which the gas is carried from the furnace to the stoves and the blast carried from the stoves to the furnace, each furnace is also equipped with two water pipes about a foot in diameter running from the river to the furnace, which carry water to cool the base of the furnace. Pelka's work was to inspect the mechanical parts of the three furnaces and keep them, including the water pipes, in good repair, and occasionally he was called on to assist in repairing the gas pipes also: but he was especially charged with the care of the water pipes which cooled the furnaces. He went to work about 5 o'clock on the night of September 28, 1916, his duties requiring him to be present at the tapping of the three blast furnaces operated by the company, to repair leaks if any should occur in the water pipes, and to see that all mechanical parts of the furnaces were in repair. The casting of the furnaces consisted in taking the iron from them, which was done by tapping them—taking out a clay plug at the bottom and running the molten iron into ladles. The record shows that on September 28th Pelka was present at four casts, at 6:30, 7:30, 9:10, and 10 o'clock, respectively. He was not present at the cast which was made at 11:10 o'clock. One witness, however, testified that he saw him and talked with him about three minutes before 12 o'clock that night, and the wife of the keeper of a saloon outside the steel plant testified to seeing him at her husband's saloon at 10 minutes after 10 o'clock that evening. The rule of the plaintiff in error was that no employee should leave the premises at this last-named hour without permission of the foreman or his assistant, and none was given Pelka. It appears from the evidence that the only time an employee had a right, under the rule, to go outside of the plant without permission, was during the lunch hour, from 12 o'clock midnight to 12:30 a. m., and then only if his card was punched by the timekeeper at the gate, and the record does not show that Pelka went out through the gate at the midnight lunch hour. He did not appear at the casts that took place at 11:10 and 12:20 o'clock. There is no evidence that tends in any way to show why he was not present at the cast at 11:10 o'clock, for his fellow employee, Gojyak, testified that he saw him and talked with him a few minutes before the midnight whistle blew, in the vicinity of furnace No. 2, and so far as the record shows he was never seen alive after that. The foreman testified that he missed him between 11 and 12 o'clock and made a search for him for some time thereafter, but could find no trace of him. He was found drowned in the slip about 200 feet west of furnace A two days after he disappeared.

[1, 2] The only question presented is whether there is any proof to warrant the conclusion that the accident resulting in Pelka's death arose out of his employment. The evidence shows that when the furnaces were in operation they produced heat around the outside of the base varying from 140° to 150° Fahrenheit; that gases were liable to, and did, escape, which, when inhaled by the workmen, at times necessitated their going or being taken to the door or outside the building to get fresh air. One witness testified he had been taken to the river for air when gassed. Men accustomed to working around these furnaces could not readily detect the odor of the gas and were liable to be overcome or affected by it before they realized that gas was escaping. Pelka was last seen at about 12 o'clock midnight in the vicinity of furnace No. 2, and the witness who saw and talked with him did not testify that there was anything in his appearance or talk to indicate he was the.. affected by gas. The foreman of the plaintiff in error testified he was around the furnace that night 13 hours and did not discover any gas. There was no proof that Pelka was affected by gas or heat the night of his disappearance. It is the theory of

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the defendant in error that Pelka was oppressed by heat or became faint and dizzy from gas, went to the dock alongside the slip for fresh air, and fell and was drowned, or, if he was in the vicinity of furnace A and desired to go to the storehouse, the best route would be along the slip to the river, then along the bank of the river northeast to the storehouse, or, if he went on a tour of inspection of the water pipes, that would take him along the dock of the slip. It is said it will not be presumed that Pelka went to the slip or river for pleasure; that the reasonable inference is he went there in the performance of his duties, accidentally fell in, and was drowned. There is nothing in the evidence to indicate that Pelka committed suicide or was murdered, but the conclusion is warranted that his death was accidental. Does the proof tend to show that it occurred while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental to it? The burden is on the applicant to prove that the accident arose out of the employment by direct and positive evidence, or by evidence from which such inference can be fairly drawn and without being based on mere conjecture or surmise. International Harvester Co. v. Industrial Board, 282 Ill. 489, 118 N. E. 711; Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712; Central Garage v. Industrial Com., 286 Ill. 291, 121 N. E. 587. In Peterson & Co. v. Industrial Board, 281 Ill. 326, 117 N. E. 1033, we said:

"Liability cannot rest upon imagination, speculation, or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them."

The foreman testified there were no repairs made by Pelka the night of the accident, that Pelka had no duties that would take him to the slip, and that he (the foreman) gave him no orders that would require him to go there. Pelka was present when the cast was made at furnace No. 2 at 10 o'clock p. m., but was not present when any of the later casts were made. He was at the Tomecal saloon, outside the grounds of the plant, without permission, 10 minutes after 10 o'clock, and was next seen at or in the vicinity of furnace No. 2 three minutes before midnight, but was not present when any other cast was made. There was no proof, direct or circumstantial, to show why he went to the river or slip, or whether he went there in fulfilling any duty of his employment or in doing anything incidental to his employment. The inference is as reasonable from the evidence that he went to the place of the accident as a voluntary act outside the duties of his employment, without the knowledge of his employer, and was drowned, as it is that he was acting in the line of the duties of his employment or engaged in something incidental to it. It can only be surmised or conjectured from the evidence how the accident happened and the reason Pelka came to the place where it occurred. Under all the authorities, this is not sufficient upon which to predicate a liability.

The judgment is reversed, and the cause remanded, with directions to the circuit court to set aside the award.

Reversed and remanded, with directions.

CARTER, J. (dissenting). I do not agree with the conclusion reached in the foregoing opinion. The principles involved in the opinion are so important and the facts so necessary to be understood that I am setting them out in this dissent at a little greater length and more in detail than they are set out in the opinion.

The evidence tends to show that there was more or less gas around the furnaces while a cast was being made. Workmen who are accustomed to working in the cast-houses become somewhat used to the gas—acclimated as it were—so that they cannot detect the odor of gas as readily as one who is only temporarily there, and that frequently the workmen, because they do not appreciate the danger, will thereby be overcome before they realize that gas is escaping. There is evidence tending to show, also that the air in the casthouses is worse when there

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is a good breeze, and that on the night deceased disappeared there was a wind blowing from the casthouses towards the slip with a velocity of from 16 to 20 miles an hour. It appears that when the furnaces are in operation an intense heat around the outside of the base is produced. The evidence tends to show Pelka had theretofore complained of headaches and dizziness caused by the gas fumes which he had inhaled about his work on the premises. There was evidence tending to show that there was a custom among employees, if they became overheated or gassed, to seek the fresh air outside the casthouses, and that sometimes they were taken by their fellow employees to the open places along the river or slip, and that there were no fences or barriers of any description to obstruct the passage of the workmen from the casthouses to the slip. The evidence shows that, after the accident and before the recovery of the body, a large boat had been towed west into the slip, and that the body of the deceased was lying just underneath the front of this boat.

There was evidence offered that no gas was noticed in the furnace room by the employees on the night in question. There was also some evidence to the effect that it was not the custom of the employees, when overheated or affected by gas, to go to the river or slip for the purpose of getting fresh air The foreman testified that the best place to recover from such an attack was in the door of the casthouse, as there was more air moving at that place. There is testimony also tending to show that it was not a hot night at the time of the accident and that deceased was wearing only overalls and jumper. There can be no question, however, from the record, that it is very hot when one is working about the furnaces.

It is conceded by both counsel that the only question at issue is whether the injury causing the death of the deceased took place in the course of and grew out of his employment. While the burden rests upon the applicant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, such proof may be made by circumstantial as well as direct evidence. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149, and cases cited. It is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it. Where there is ground for comparing and balancing probabilities at their respective values and where the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in favor of the applicant. Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651. What is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent. What is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. Owners of Ship Swansea Vale v. Rice, 4 B. W. C. C. 298. There can be no question that the death of Pelka was caused by his falling into the river or slip. There is no evidence in this record in any way tending to show that he was pushed in by some third party, and the presumption here must be against suicide on his part. The evidence shows that he had been in good health, and there is an absolute absence of evidence showing suicide; therefore it must be presumed, under the authorities, that his death was accidental. Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269; Devine v. National Safe Deposit Co., 240 Ill. 369, 88 N. E. 804; Von Ette v. Globe Newspaper Co., 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641. It has been held that an employee is engaged in the course of his employment when an injury occurs within the period of his employment at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. Dietzen Co.

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v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. The deceased was seen alive and well just before midnight, was not present at the casting of the furnace at 12:20 o'clock, and immediately thereafter search was made for him; so it is a fair inference that he was drowned some time between 12 o'clock midnight and 12:30 thereafter, and that the accident occurred during the regular hours of employment, on the premises of plaintiff in error. If there is any evidence fairly tending to show that the duties of deceased, or anything which may be held to be fairly incidental thereto, took him along the slip at the time he fell in, then there can be no question, under the authorities, that the accident arose out of and in the course of his employment. The burden is on the applicant to prove his case. This does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the deceased fell into the water and was drowned while performing duties in the course of his employment or duties incidental to that employment, then the case is proved. Marshall v. Owners of Ship Wild Rose, 3 B. W. C. C. 514.

Many cases somewhat similar as to the facts have been decided in various jurisdictions under statutes worded similarly to our own. It has been stated that cases are valuable in so far as they contain principles of law and also to show the way in which the judges regard facts. Peoria Railway Terminal Co. v. Industrial Board, supra. In Mackinnon v. Miller, 2 B. W. C. C. 64, an engineer on board a small tug, when last seen, was asleep in his bunk at 5 o'clock a. m. An hour afterwards he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to move at 7 o'clock a. m., and steam had been ordered gotten up for that hour. The deck was a place where between 5 and 7 o'clock a. m. the deceased was entitled to be. The bulwark was 20 inches in height. Two days afterwards his body, clothed in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question, but there was no direct evidence as to how he met his death. It was held that the arbitrator was entitled to draw, as he had drawn, the inference of fact that the deceased had accidentally fallen overboard and was drowned and that the accident arose "out of and in the course of" his employment, and it was therefore not for the court to interfere.

In Owners of Ship Swansea Vale v. Rice, supra, the deceased was chief officer of the ship, whose duty it was to be employed on the deck. He disappeared in broad daylight, no one having seen him fall overboard, but there was evidence that not long before he complained of a headache and giddiness. It was held by a divided court that there was evidence under which the court might infer that he fell overboard from an accident arising out of and in the course of his employment. In deciding the case in the House of Lords, one of the judges writing the opinion, after discussing various things which might have happened, said (page 301):

"The only other alternative is suicide or murder, and if you weigh the probabilities one way or the other, the probabilities are distinctly greater in favor of the view that this man perished from accident arising out of his employment."

In Kerr v. Ayr Steam Shipping Co. (1915), App. Cas. 217, a steward of a ship in harbor was lying in his bunk when he was told by the captain to prepare some tea for the crew. Shortly afterwards he was missing. The next day his dead body, dressed only in his underclothes, was found in the sea near the ship. The bulwarks were three feet five inches above the deck. He was a sober man but was subject to nausea. Murder and suicide were negatived by the arbitrator, who drew the inference that the deceased went on deck and accidentally fell overboard and was drowned, and held that the accident arose out of and in the course of his employment as steward. The court of session (Lord Guthrie dissenting)

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reversed the decision on the ground that there was no evidence to support it. The House of Lords by a divided court upheld the finding of the arbitrator, and stated that, although upon the evidence it was open to the arbitrator to take a different view, his conclusion was one that a reasonable man could reach, and therefore, even though the court might take a different view if the judges themselves were deciding the question as to the facts, the only duty of the court was to decide whether the conclusion was one that could have been reached from the evidence by a reasonable man.

In Marshall v. Owners of Ship Wild Rose, supra, an engineer came on board a vessel, which was lying in a harbor basin, shortly after 10 o'clock p. m. Steam had to be gotten up by midnight. He went below and took off his clothes, except trousers, shirt, and socks. It was a very hot night. He subsequently got out of his berth, saying he was going on deck for a breath of fresh air. Next morning his dead body was found at the side of the vessel, just under the place where the men usually sat when they went on deck to get fresh air. The county judge found that he came to his death by an accident arising out of and in the course of his employment, and by a divided court his decision was reversed, the court holding that there was no legitimate ground for drawing the inference that he died from an accident arising out of his employment.

In Von Ette v. Globe Newspaper Co., supra, Von Ette was employed by the newspaper company as a compositor. He went to work on the evening of June 21, 1914, and his employment would have been finished at a quarter before 2 o'clock the next morning. He was last seen alive about 11 o'clock that evening. His dead body was found the next morning at a quarter before 4 o'clock upon the ground, six stories below the floor where he worked. The injuries which caused his death resulted from falling from the roof of the building adjoining the room in which he worked. He was apparently in good health, cheerful in disposition, and there was no evidence tending to show that he had any trouble of any kind. The evidence tended to show that there was an established custom among the employees, known to the employer, to go out upon that roof to obtain fresh air. The Industrial Board found that the accident arose out of and in the course of the employment, there being no evidence that indicated any other cause of death, and the court affirmed the finding.

A reading of the opinions in the cases just cited, a number of them being decided by divided courts, will show how close were some of the questions involved and how difficult it is for all men to agree whether an accident somewhat similar to the one here under consideration arose out of and in the course of the employment. The deceased was the only pipe fitter working on the night in question. He was required to look after and inspect and keep in good repair all the mechanical parts of the three furnaces and the six water pipes carrying the water from the river to the furnaces. In the performance of these duties, as I understand the record, he necessarily had to travel to and from the three casthouses, the boiler house, and the storehouse northeast of the casthouses, and might be required to go to a small storehouse just south of the casthouse in which was located furnace A and 70 or 80 feet north of the slip where his dead body was found. There were no regular roads or passageways on these premises. Buildings, railroad tracks, sheds, and structures of all kinds were located wherever convenience demanded. It might be impossible to take a direct course in going from one place to another. It was, however, possible to walk from the western extremity to the eastern extremity of the plant, and it would appear reasonable from the evidence in the record that in going from one extremity of the plant to the other a workman might think it more convenient to go to the Calumet river and walk on the dock or cement walk alongside the river and the slip. In going from the large storehouse it would not require much of a detour to take the route along the river and slip to furnace A. The evidence

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tends strongly to show that there was always liable to be gas in and about the furnaces, and that deceased had complained theretofore to his family about headaches and dizziness caused by inhaling these gas fumes. In addition to the impurity of the air, the heat around the base of the furnaces must necessarily at all times have been somewhat oppressive, ranging from 140° to 150° Fahrenheit; the heat within the furnaces being from 500° to 1,500° Fahrenheit. The evidence tends to show that it was a custom, known to the foreman of plaintiff in error, for the men when oppressed by the heat or troubled by the gas, to go outside the buildings to cool off or get fresh air to counteract the effect of the fumes; that generally the men so overheated or troubled by gas would satisfy themselves by simply stepping outside the casthouse, but that sometimes they would go even to the boundaries of the river or the slip and that once outside the casthouse there were no fences or boundaries between them and the dock or cement walk alongside the river and slip.

The suggestion offered by plaintiff in error as to how the deceased came to his death is that he fell into the slip while returning from a secret visit to the saloon and while he was intoxicated. This question cannot be raised here, as it was specifically stated on the trial before the Industrial Board that plaintiff in error made no question as to deceased being intoxicated, therefore counsel acting for plaintiff in error, cannot for the first time raise that question here. American Milling Co. v. Industrial Board, 279, Ill. 560, 117 N. E. 147. and cases cited. Moreover, the direct evidence shows that the deceased was not under the influence of liquor when he visited Tomecal's saloon a little after 10 o'clock, and his fellow employee, Gojyak, stated that when he was last seen alive, just before midnight, he was not intoxicated. The suggestion also seems to be made that deceased may have gone down to the river or the slip to look at the stars or for some other reason not connected with his employment. There is no evidence tending to support in any way this theory. If, however, he was oppressed by heat or felt faint or dizzy from gas, the dock along the river or slip would be one of the most probable places where he would go for fresh air, or, if he were in the vicinity of certain casthouses and wanted to go to a certain storehouse, one of the easiest and most reasonable routes for him to take would be to proceed along the slip and river.

The authorities all agree that the arbitrator must not surmise, conjecture, or guess in reaching his conclusion; that he must infer from the facts actually proven; and that. while it is impossible to lay down any rule as to the degree of proof sufficient to justify an inference being drawn, it must be such that the evidence would induce a reasonable man to draw it; that if the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture then the applicant fails to prove his case; but where there is ground for comparing and balancing probabilities at their respective values, when the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in his favor. Peoria Ry. Terminal Co. v. Industrial Board, supra. The only question before the court is whether the arbitrator was justified, on the facts proved, in drawing the conclusion that he has drawn. As we stated in one of the opinions in Owners of Ship Swansea Vale v. Rice, supra, in weighing the probabilities in this case the probabilities are distinctly greater that this man perished through an accident arising out of and in the course of his employment than any of the alternatives suggested. Furthermore, as was said by the court in Von Ette v. Globe Newspaper Co., supra, on page 59 of 223 Mass., on page 697 of 111 N. E., on page 643. of L. R. A. 1916D:

"A finding of the Industrial Accident Board is not to be set aside if warranted by the evidence, although we might feel that a different conclusion would have been reached by us if we had been called upon to decide the question in the first instance. If this claimant were required

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to prove all the facts and circumstances attending her husband's death by direct evidence, it is plain that her claim would fail, but she is not limited to such proof. She may show the existence of such facts as would warrant the inference that her husband did not commit suicide, and did not meet with his death as the result of intoxication. * * * We cannot say that the finding of the board that his death was accidental was not warranted."

The reasoning in the foregoing quotation applies here, and I think that a similar conclusion should be reached.

SUPREME COURT OF ILLINOIS.

G. H. HAMMOND CO.

v.

INDUSTRIAL COMMISSION ET AL. (No.12470)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CAUSE OF INJURY—SUFFICIENCY OF EVIDENCE.

Evidence *held* to warrant conclusion that abscess which developed in hip of injured employe resulted from the injury.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CAUSE OF DEATH.

Where injury to employe caused abscess which necessitated cutting and chiseling away a part of the bone, so that the limb gave way because of weakened bone while employe was getting out of bed, causing hemorrhage requiring operation from which he died, the death was the result of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—NOTICE TO EMPLOYER—EVIDENCE.

Evidence *held* to tend to show that wife of injured employe notified employer of injury.

(For other cases, see Master and Servant, Dec Dig § 405[1].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PROCEEDINGS—REVIEW.

Where there is evidence tending to show that notice of injury was given to employer, the award of the Industrial Commission will not be disturbed by the Supreme Court, though the court is of the opinion that such finding was contrary to the weight of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—RIGHT OF ADMINISTRATOR.

Under Workmen's Compensation Act, § 7, par. f, administrator of deceased employe has right to prosecute application for compensation and

*Decision rendered, April 25, 1919. 123 N. E. Rep. 384. Rehearing Denied June 4, 1919.

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collect any award made; the employer being protected by the requirement of such statute that the administrator shall relieve the employer of all obligation as to distribution of the award.

(For other cases, see Master and Servant, Dec. Dig. § 400.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—COMMUTATION OF COMPENSATION IN LUMP SUM.

Under Workmen's Compensation Act, § 7, pars. a and f, the right to have compensation commuted to lump sum is available only to employer who voluntarily pays compensation, and not to employer who denies liability and refuses to make compensation until he has been adjudged liable in a proceeding conducted under that provision of the statute.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD TO ADMINISTRATOR—DISTRIBUTION.

Under Workmen's Compensation Act, § 7, pars. a and f, Industrial Commission, in awarding compensation to administrator in lump sum, was not required to declare the proportion of the award each of the beneficiaries should receive, since such distribution is to be made under the direction of the court appointing the administrator.

(For other cases, see Master and Servant, Dec. Dig. § 386[5].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by David Eichberg, administrator of the estate of Wowzymec Bonkowski, for compensation for the death of Wowzymec Bonkowski, opposed by the G. H. Hammond Company, employer. Award by the Industrial Commission for claimant confirmed by the circuit court, and the employer brings error. Affirmed.

T. M. Coen, of Chicago, for plaintiff in error.
Scott Osten Cavette, of Chicago, for defendant in error.

FARMER, J. The circuit court of Cook county confirmed an award made by the Industrial Commission against the G. H. Hammond Company in favor of the administrator of the estate of Wowzymec Bonkowski, and certified that the case was a proper one to be reviewed by this court.

Bonkowski was employed by plaintiff in error November 9, 1914. His work was loading and unloading barrels of meat. He continued to work until the 16th of November, after which time he did not do any more work. He returned to his home after the last half day he worked for plaintiff in error, lame, complained of his leg hurting him, said he was sick, and went to bed. Nine days later he was taken to the Cook County Hospital. The surgeon who treated him there testified that he had an abscess on the left thigh which contained pus. The doctor opened it and drained the pus. He testified the abscess was the result of an injury to the leg. After it was drained, the patient got better, but later osteomyelitis developed, necessitating an operation on the bone, which weakened the bone. When the operation was performed, January 15, 1915, Bonkowski was pale, anaemic, had lost flesh, and could hardly walk. His general physical condition, due to infection, was run down and weakened, and his vitality and powers of resistance lowered. The attending physician ordered him kept in bed, but subsequently an interne in the hospital permitted him to get out of bed. He fell and broke the bone at the place where it was diseased, which caused a severe hemorrhage. Afterwards, on September 6, 1915, another operation was performed, and a few hours later Bonkowski died. The doctor testified the death resulted from osteomyelitis, lowered resistance from long illness, hemorrhage and shock. The treatment given Bonkowski he said was necessary.

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[1, 2] Plaintiff in error insists that the death was not due to an accident arising out of and in the course of the employment of the deceased, but was due to an intervening cause. The testimony shows that November 16, 1914, deceased, with others, was engaged in unloading barrels of meat from a car. A barrel weighing about 500 pounds was pried from its position on top of other barrels, suddenly fell, and rolled, striking deceased, knocking him down and injuring his leg. The proof warrants the conclusion that the abscess which developed and caused deceased's removal to a hospital resulted from that injury. But plaintiff in error contends Bonkowski's death did not result from that injury, but was due to his fall in the hospital, which intervened between the accident received where he was employed and the death. The testimony of the physician who treated Bonkowski was, in substance, that the abscess on his thigh was caused by an external injury; that the pus which had formed had eaten through and destroyed the tissue and blood vessels and attacked the bone, which necessitated curetting and chiseling away a part of the bone. This weakened the bone, and while getting out of bed the limb gave way, Bonkowski fell to the floor, and the femur broke at the place it was eaten by disease. He was operated on six days later and died from the shock the same day. The Industrial Commission was warranted by the proof in finding death resulted from the injury. Bailey v. Industrial Com. (No. 12525) 286 Ill. 623, 122 N. E. 107.

[3, 4] It is insisted notice of the injury alleged to have caused the death was not given plaintiff in error within 30 days after the accident, as required by section 24 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 149). The evidence shows that the deceased, while engaged in performing the duties of his employment, was struck by a falling or rolling barrel of meat weighing in the neighborhood of 500 pounds. The foreman of the men with whom deceased worked testified Bonkowski told him he had been struck by a rolling barrel, had a pain in his leg, and could not work any more. The foreman told him to go to the company doctor. Another witness testified to hearing the foreman notified by the deceased of his injury by the barrel. The widow testified he came home sick, complaining that his leg hurt him, and his walk indicated it. The leg was bruised black and blue from about two inches above the knee to the thigh. He was at home nine days before he was taken to the hospital. Mrs. Bonkowski went to plaintiff in error's office twice. She testified there were three men in the office. She could not tell who they were, but thought one of them was timekeeper. It was the office where the men got their pay. She asked for half pay for her husband, and told the men in the office her husband was hurt while at his work by a barrel falling on his leg and was in bed. She was not known to the men in the office, and they refused to pay her unless she was identified. The statute requires notice of the accident to be given not later than thirty days after it happens. Notwithstanding the testimony of Mrs. Bonkowski was contradicted by witnesses for plaintiff in error, her testimony and that of other witnesses tends to show that notice of the accident was given within the time required, and, that being the case, we cannot reverse the judgment and award, even if we were of the opinion, which we are not, that the finding that notice was given was contrary to the weight of the testimony.

[5, 6] Bonkowski left surviving him his wife and two children. An administrator of the estate was appointed and qualified and filed an application for compensation for a fatal injury to his intestate. The application was heard by an arbitrator October 11, 1916, and award made of $5.10 per week for a period of 416 weeks, as provided by paragraph (a) of section 7 of the Workmen's Compensation Act (section 132). The award was confirmed on review by the Industrial Commission. Counsel for plaintiff in error moved the arbitrator to dismiss the proceeding brought by the administrator, and stated plaintiff in error elected, if liable, to make compensation to the beneficiaries of the deceased. The

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motion was denied, and it is claimed the judgment of the circuit court should be reversed and the award set aside for that reason. The argument in support of this position is hat the right to the compensation is vested in the dependents of the deceased, is no part of his estate, and plaintiff in error elected, pursuant to paragraph (f) of section 7, to pay compensation, if liable therefor, to the dependents of deceased. The statute clearly recognizes the right of an administrator to prosecute an application for compensation and collect any award made, and provides that the payment of compensation to the personal representative of the deceased shall relieve the employer of all obligation as to the distribution of the fund; but such distribution shall be made by the personal representative pursuant to the order of the court appointing him. Section 7, par. (f), supra. Plaintiff in error did not elect to pay an award to any one without compulsion, so is in no position to invoke the provision of paragraph (f) of section 7 that compensation for an injury which results in death may, at the option of the employer, be paid either to the personal representative of the deceased employe or to his beneficiaries. That provision may be availed of by one who voluntarily pays the compensation, and does not apply where the employer denies liability and refuses to make compensation until he has been adjudged liable in a proceeding conducted under that provision of the statute. Smith-Lohr Coal Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231. Here plaintiff in error denied liability, and it was necessary that an application for adjustment of claim for compensation be filed and determined in the regular way. Plaintiff in error at no time unequivocally elected to pay compensation t the beneficiaries of deceased, but the announcement of its election to pay the beneficiaries was qualified by the condition that it would do so if it was liable to make compensation on account of the death of the employe. Some one had to institute proceedings to determine that question, and the administrator was authorized to do that. Plaintiff in error was in no way injured or prejudiced by the requirement that it pay the administrator. The statute expressly provides that payment to the administrator shall relieve plaintiff in error of all obligation as to its distribution.

[7] The proof showed deceased left a wife and two children. The amount of the award is authorized by paragraph (a) of section 7, and paragraph (f) of said section authorizes the distribution to be made under the order of the court appointing the administrator. The Industrial Commission was not required, therefore, to find and declare the proportion of the award each of the beneficiaries should receive.

The judgment is affirmed.

Judgment affirmed.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

NORDYKE & MARMON CO. ET AL.

v.

SWIFT ET AL. (No. 10491.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISOBEDIENCE OF ORDERS.

Where an employer acquiesced in the violation of an order, it was nullified, and a servant acting contrary thereto could not be said to have

*Decision rendered, May 27, 1919. 123 N. E Rep. 449.

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acted in disobedience of orders, so as to be guilty of willful misconduct under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS BEFORE INDUSTRIAL BOARD.

In proceedings under the Workmen's Compensation Act, the Industrial Board is authorized to draw reasonable inferences from the facts established and from the circumstances shown by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The words "accident arising out of and in the course of the employment," as used in the Workmen's compensation Act, should be given a liberal construction.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

A janitor killed while attempting to obtain clean gasoline for cleaning floors came to his death by "accident arising out of and in the course of his employment" within the Workmen's Compensation Law, although he was deviating from the usual custom by preparing to use clean instead of dirty gasoline; it being assumed, in the absence of a contrary showing, that he was exercising reasonable discretion under the circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING IN THE "COURSE OF EMPLOYMENT."

An employee may be said to receive an injury by accident arising in the course of his employment, within the Workmen's Compensation Act, when it occurs within the period of the employment, at a place where he may reasonably be, and while he is doing something reasonably connected with his employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING IN THE "COURSE OF EMPLOYMENT."

That an employee, in attempting to procure clean gasoline for cleaning floors, was disobeying an order to use dirty gasoline, has no bearing on the question whether the injury was one arising in the course of employment, within the Workmen's Compensation Act, bearing only on the question of willful misconduct.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from Industrial Board.

Proceedings by Grace E. Swift and others, under the Workmen's Compensation Act, to obtain compensation for the death of George E. Swift, deceased, opposed by the Nordyke & Marmon Company, the em-

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ployer, and the Indiana Manufacturers' Reciprocal Association. There was an award, and the employer and the Reciprocal Association appeal. Award affirmed and increased.

Joseph W. Hutchinson, of Indianapolis, for appellants.
White & Jones, of Gary, for appellees.

BATMAN, C. J. The record in this case discloses that appellees are the widow and children of one George E. Swift, deceased, who met his death while in the employ of appellant Nordyke & Marmon Company. Appellees on September 28, 1918, filed with the Industrial Board of Indiana an application for the adjustment of their claim for compensation. Appellants appeared thereto and joined issues thereon. After a hearing and an award by a single member of said board, and a review thereof by the full board, a finding was made which contained, among others, the following facts: That on September 5, 1918, George E. Swift was in the employ of appellant company as a janitor foreman; that for several months prior to said date there were 35 or 40 employees of said company in the janitor force, who worked under the said George E. Swift, and were subject to his orders; that for the purpose of cleaning the floors, and especially the aisles, in the buildings of said company, the said force of janitors had been in the habit of using dirty gasoline, that is, gasoline that had been used for the purpose of cleaning machines; that on said date, while the said George E. Swift was preparing to procure clean gasoline, with which to clean the floors in the buildings of said company, by drawing the same from a tank containing 30,000 gallons, he took hold of an electric wire for the purpose of attaching it to a bucket with which to draw gasoline from said tank; that he accidentally took hold of a socket attached to said wire, thereby receiving an electric shock which caused his death on said date; that about the middle of July, 1918, some officer of the United States government had called the attention of said company to the fact that is was desirable to conserve the supply of gasoline, and requested that its use be discontinued for all unnecessary purposes; that soon thereafter an organization in the plant of said company, known as the fire board, passed a resolution requesting a discontinuance of the promiscuous use of gasoline, and issued a written order to that effect, but the evidence does not show that the written order was ever called to the attention of the said George E. Swift; that said order was made for the purpose of conserving the supply of gasoline, and not as a safety measure; that the janitor force did not discontinue the use of gasoline for the purpose of cleaning the floors after the passage of said resolution by the fire board until after the death of the said George E. Swift, but the evidence does not show whether clean gasoline had ever been used by the said George E. Swift and the janitors working under him on any previous occasion. There is also a finding:

"That his [Swift's] attention was verbally called to the fact of the request of the federal government by at least two representatives of the defendant company, and one representative of the defendant company had suggested to him on one occasion that the use of gasoline for the purpose of cleaning the floors should be discontinued; * * * that the evidence does not show that the defendant company ever took any steps to require the discontinuance of its use for that purpose."

On the facts found the full board made an award in favor of appellees, from which this appeal is prosecuted.

[1-3] Appellants contend that the evidence is not sufficient to sustain that part of the finding quoted above. In support of this contention they cite the adoption of the resolution by the fire board, and the statements made to the decedent with reference thereto, by two other members of appellant company, O'Hara and Hardwick, whereby it is claimed that the decedent was directed to discontinue the use of gasoline in cleaning floors, instead of being given a mere suggestion in that regard. The evi-

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dence with reference to the adoption of the resolution by the fire board tends to show that it merely provided that the promiscuous use of gasoline should not continue; that it was adopted for the purpose of conserving gasoline in pursuance of a suggestion from the United States government, and not as a safety measure. There is no evidence that the use of gasoline for cleaning floors was mentioned therein, or that it was intended thereby to prohibit its use for such purpose. In fact, it would be reasonable to infer the contrary, in view of the fact that the gasoline used for such purpose was gasoline which had been previously used in cleaning machines, and had thereby become dirty. Under these circumstances it is not reasonable to presume that the conservation of such gasoline was covered, either by a suggestion of the government or the resolution of the Fire Board adopted in pursuance thereof. It appears from the evidence that after the adoption of said resolution the employees named above made certain statements to the decedent with reference thereto, and to the use of gasoline for cleaning floors. Any statement made by said O'Hara may be disregarded in this connection, as the uncontradicted evidence shows that he had no control over the decedent, or his work in cleaning the floors, and that the decedent was in no way bound by what he may have said about the use of gasoline for that purpose. As to the employee Hardwick the evidence shows that he was a member of the fire board, but this fact is not significant, as it is apparent that the scope of a resolution cannot be enlarged beyond what reasonably appears from its context, even by a member of adopting body. The evidence tends to show that this witness had only a divided supervision over the decedent, but whether his supervision included the work of cleaning floors does not appear. However, the Industrial Board may have believed, as the evidence tends to prove, that in what he said to the decedent about the use of gasoline he was only attempting to communicate to him the contents of the resolution adopted by the fire board, and did not intend thereby to give him an independent order with reference to the use of gasoline. But, even if it could be said that he had authority over the decedent, with respect to the use of gasoline in cleaning floors, and that his statements to him with reference thereto should be construed as an order in that regard, there is evidence of facts from which it may be reasonably inferred that appellant company knew that it was not being obeyed, and had acquiesced in its violation, which, under the law, would have the effect of nullifying the same. In determining what its finding should be, the Industrial Board had all the evidence before it, and was authorized to draw reasonable inferences from the facts established and the circumstances shown thereby. Haskell & Barker Car Co. v. Brown (Ind. App. 1917) 117 N. E. 555. It reached the conclusion stated above on the question under consideration, and on the facts and circumstances shown by the evidence we cannot say there was error in so doing.

[4] Appellants also contend that the finding of facts is not sufficient to sustain the award. They base this contention chiefly on the fact that the special finding shows that prior to the time the decedent was injured it has been the custom to use dirty gasoline in cleaning the floors; that on the occasion in question the decedent was preparing to draw clean gasoline from a large tank for that purpose; that in making said preparation he secured an electric wire, which he intended to attach to a bucket for the purpose of drawing the gasoline from said tank; that the wire was charged, and he accidentally took hold of the socket, whereby he received an electric shock which caused his death. They insist that these facts, when taken in connection with the further finding that the evidence does not show whether or not the decedent, and the janitors working under him, had ever used clean gasoline on any previous occasion, disclose that the accident which caused the decedent's injuries did not arise out of and in the course of his employment, and hence the appellees are not entitled to an award. This court is committed to the doctrine that the words "by accident arising out of and in the course

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of the employment," as used in the Workmen's Compensation Act of this state (Laws 1915, c. 106), should be given a broad and liberal construction in order that the humane purpose for which it was enacted may be realized. Holland, etc., Co. v. Shraluka (Ind. App. 1917) 116 N. E. 330; United Paper Board Co. v. Lewis (Ind. App. 1917) 117 N. E. 276. It has been said that, in order for an accident to arise out of and in the course of the employment, it must result from a risk reasonably incident thereto; that the words "out of" refer to the cause of the accident, while the words "in the course of" to the time, place, and circumstances under which the accident takes place; that the former words are descriptive of the character or quality of the accident, while the latter words relate to the circumstances under which an accident of that character or quality takes place. A quotation containing this statement, in substance, was cited with approval in the case of Haskell & Barker Car Co. v. Brown, supra. The difficulty, however, does not arise so much from a determination of a proper definition of the clause under consideration, as it does from an application of the same to a given state of facts. In this connection it has been frequently said that each case must be determined from a consideration of its own facts and circumstances. Inland Steel Co. v. Lambert (Ind. App. 1917) 118 N. E. 162.

[5] Directing our attention to the facts disclosed by the finding in the instant case, it is obvious that, if the decedent had received his injuries while preparing to obtain dirty gasoline for use in cleaning the floors, in accordance with the custom in that regard, they would have been received by accident arising out of and in the course of his employment. The question now arises whether it must be held otherwise because the finding shows that he was preparing to obtain clean gasoline for such purpose, and also shows that there was no evidence as to whether he and the janitors working under him had ever used clean gasoline on previous occasions. The Industrial Board had held, in effect, that this question must be answered in the negative, and in our opinion it reached the right conclusion. It is apparent that the decedent was preparing to procure clean gasoline for the purpose of performing work in the scope of his employment. True, it appears that he was deviating from the usual custom in that regard, by arranging to use clean instead of dirty gasoline, but that is not sufficient to force a conclusion that the accident resulting in his death did not arise out of and in the course of his employment, as it will be presumed, in the absence of a finding to the contrary, that a servant may use some discretion in the performance of the work assigned him. Indeed, the services of an employee, who must be directed as to the details of his work under all the varying circumstances that may arise, as a rule, would be undesirable, and in many instances of little value. Under the facts found in the instant case it should not be assumed that the decedent, in attempting to procure clean gasoline to carry on his work, did a wrongful act, or turned aside from his employment so as to place himself and his dependents outside of the protection of the law, but rather that he was exercising a reasonable discretion in the discharge of his duties under the existing circumstances. Elk Grove, etc., v. Industrial, etc., 34 Cal. App. 589, 168 Pac. 392. In this connection it should be observed that the Workmen's Compensation Act of this state does not limit compensation to cases where an injury is received by an employee while he is performing his work in the usual and customary manner or in the way directed. It is a fair inference that, if the Legislature had intended to so limit the right to compensation, appropriate language would have been used to indicate such fact. We are therefore justified in refusing to give it such a narrow construction, and in holding that an employee who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his work, does not thereby necessarily deprive himself or his dependents, of a right to compensation, if injured while so engaged. State ex rel. v. District Court, etc., 129 Minn. 176, 151 N. W. 912.

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[6, 7] An employee may be said to receive an injury by accident arising in the course of his employment within the meaning of the Workmen's Compensation Act of this state when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment. In re Ayers (Ind. App. 1918) 118 N. E. 386; Granite, etc., Co. v. Willoughby (Ind. App. 1919) 123 N. E. 194; N. K. Fairbank Co. v. Industrial, etc., 285 Ill. 11, 120 N. E. 457. It will be observed that under this rule it is not necessary that an employee, in order to receive compensation if injured, shall be performing his duties in obedience to some direction, or in accordance with some general rule or custom. It suffices if he be doing something reasonably connected therewith. Under this rule and the facts found, the procurement of clean gasoline with which to clean the floors, even if it had never been used for that purpose before, was clearly the performance of an act reasonably connected with such work. This would be true even if the facts disclosed, as appellants contend the evidence shows, that the decedent, in attempting to procure clean gasoline for such purpose, was disobeying an order therefore given him in that regard, as the fact of such disobedience would bear on the question of willful misconduct rather than on the question under consideration. National, etc., Co. v. Marr (Ind. App. 1919) 121 N. E. 545.

Under the facts found, there are no sufficient grounds on which to base a conclusion that the decedent's injury and death were due to willful misconduct. For the reasons stated, we conclude that the finding of facts is sufficient to sustain the award.

Finding no error in the record, the award is affirmed, and, by virtue of the statute, the amount thereof is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

HOME PACKING & ICE CO.

v.

CAHILL. (No. 10488.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—AGREEMENT FOR COMPENSATION.

The employer cannot complain of an agreement for compensation to an injured employee, filed with and approved by the Industrial Board, because it made no provision for payment during a period of partial disability which might ensue in the course of recovery.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL.

Where the injured employee and employer entered into an agreement for compensation approved by the Industrial Board, and employer's petition to set aside the agreement was denied by the board and resumption

*Decision rendered, May 29, 1919. 123 N. E. Rep. 415.

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of payments ordered, and appeal from such decision cannot raise the question that the sole power to enforce an award rests in the circuit court.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AGREEMENT AS TO COMPENSATION.

An agreement for compensation entered into between an injured employee and employer and insurance carrier, knowing all the details, made pursuant to the Workmen's Compensation Act, is an admission of liability.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AGREEMENT AS TO COMPENSATION.

An agreement for compensation, entered into between an injured employee and employer and insurance carrier, approved by the Industrial Board, as provided in the Workmen's Compensation Act, has the force and effect of an award.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AGREEMENT AS TO LIABILITY.

An agreement for compensation, entered into between an injured employee and the employer and insurance carrier, with knowledge of the details of accident, approved by the Industrial Board, as provided by the Workmen's Compensation Act, cannot be set aside at the instance of employer and insurance carrier, merely to enable the employer to assert the subsequently raised contention that the injury did not arise out of and in the course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Industrial Board.

Petition by the Home Packing & Ice Company against William Cahill, to set aside an agreement as to compensation under the Workmen's Compensation Act, which agreement was filed with and approved by the Industrial Board. The petition having been denied by the Industrial Board, the employer appeals. Affirmed.

Batt & Danner, of Terre Haute, for appellant.

A. J. Kelley and F. S. Rawley, both of Terre Haute, for appellee.

DAUSMAN, J. On April 1, 1917, the appellee received an injury by accident while at appellant's industrial plant. Thereafter appellant's insurance carrier made an investigation of the matter and reported to appellant that appellee was in the employment of appellant at the time of the accident, that appellee's injury arose in the course of the employment, and that his average weekly wage at said time was $35. On November 5, 1917, the parties hereto entered into an agreement as to compensation under section 57 of the Workmen's Compensation Act (Laws 1915, c. 106). This agreement was signed also by the insurance carrier, and was filed with and approved by the Industrial Board. Pursuant to the agreement, appellant paid the medical, hospital, and surgical expenses occasioned by the injury, and also compensation aggregating $435.60. On August 2, 1918, appellant filed its verified petition to set aside the agreement on the ground (1) that it was entered into by reason of mutual mistakes of fact, and (2) that it does not fully comply with the statute.

The specific facts, concerning which it is averred the parties acted mistakenly, are the following: (1) That appellee was in the employ of appellant when he received the injury, but in truth he was not; (2) that

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appellee's average weekly wage was $35, but in truth was only $21.10; and (3) that the injury, by accident, arose out of and in the course of the employment, but in truth did not. The particular defect, which appellant claims constitutes an incompleteness, is that it provides compensation for the period of total disability only, and fails to make any provision for compensation for any period of partial disability which may ensue.

After hearing the evidence, the board found that there was no mistake, refused to set aside the agreement, and ordered appellant to resume payments thereunder. We have considered the evidence carefully, and we find that it tends fairly to support the decision of the board with respect to the alleged mistakes.

[1] The alleged incompleteness of the agreement, if it be a defect at all, is of such a character that appellant cannot complain of it. With some semblance of reason appellee might complain of it on the ground that in the course of recovery his total disability may cease and a period of partial disability may follow, for which partial disability no compensation is provided. But the statute supplies a way by which any change in the condition of the workman may be presented to the board and the proper relief obtained.

[2] Appellant asserts that the board has no power to order a resumption of payments and that the sole power to enforce an award rests in the circuit court. But the attempt to procure a decision on that point in this appeal is manifestly premature.

[3-5] The sufficiency of the petition to raise the question whether the injury arose out of and in the course of the employment has not been presented. But we deem it advisable to say that we doubt the propriety of permitting that question to be tried on a petition to set aside an agreement for compensation. Appellant earnestly insists that the injury did not arise out of the employment; but does not claim that there was any mistake as to any specific fact entering into this element. Apparently appellant and its insurance carrier were fully informed concerning every evidential fact, and from these facts they drew their own conclusion. Knowing all the details, they concluded that the injury arose out of and in the course of the employment. By making the agreement they admitted and confessed liability. See Retmier v. Cruse, 119 N. E. 32. They recognized the agreement by continuing to make payments thereunder, but finally it occurred to them that perhaps they erred in their conclusion as to their liability. Evidently their petition was then filed in the hope that by this procedure they could have the board determine whether the injury arose out of and in the course of the employment, and thus procure a review of the very thing which they had determined for themselves. An agreement for compensation, made in compliance with the statute and approved by the board, has the force and effect of an award. In re Stone, 117 N. E. 669. It would seem that an award resting on an agreement ought not to be set aside for the mere purpose of permitting an employer to try out the merits of his confession of liability. It may be proper in a proceeding of this character to show that there was a mistake as to some specific fact which would result in modifying the award in some particular; but we are inclined to the opinion that the question of liability cannot be raised in this manner. It is doubtful, also, whether the statute contemplates an appeal from the action of the board with respect to petitions of this kind.

The action of the Industrial Board is affirmed.

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SUPREME COURT OF KANSAS.

GILLILAND ET AL.

v.

ASH GROVE LIME & PORTLAND CEMENT CO. (No. 22124.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"INJURY "ARISING OUT OF EMPLOYMENT"—"INJURY BY ACCIDENT."

A workman's employment required him to break rock in a quarry with a 16-pound sledge and load the rock into a car, which was hard work. At noon he was in apparent good health and spirits, and ate all of the lunch which his wife brought to the quarry for him. In the afternoon, while at his working place, and shortly after he was seen beating a large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. He had been working in the quarry for several months, and before that had worked for three years in the sacking department of a cement plant, an exceedingly dusty place. *Held,* the facts stated indicated injury by "accident," and injury "arising out of the employment," within the meaning of the first section of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident.)

Appeal from District Court, Neosho County.

Action by Millie A. Gilliland and Leonard Gilliland, by his guardian ad litem, R. B. Smith, against the Ash Grove Lime & Portland Cement Company, to recover compensation, under the Workmen's Compensation Act, for the death of one on whom they were dependent. Demurrer to plaintiff's evidence sustained, and judgment for defendant, and plaintiffs appeal. Reversed and remanded for new trial.

T. F. Morrison, of Chanute, for appellants.

J. K. Cubbison and W. G. Holt, both of Kansas City, Mo., for appellee.

BURCH, J. The action was one by dependents for compensation for death of a workman. A demurrer was sustained to the plaintiffs' evidence, judgment was rendered for the defendant, and the plaintiffs appeal.

The deceased worked for about three years in the sacking department of the defendant's plant, and for several months before his death worked in the defendant's quarry. The sacking department was an exceedingly dusty place. In the quarry masses of rock were dislodged by the use of dynamite. Large masses were then reduced to fragments by the same means. Fragments larger than a man could lift, and weighing up to 500 pounds or more were reduced by use of a sledge. Rock thus reduced was lifted and shoveled into small cars which were moved to the plant. While working in the quarry, the workman was paid by the car for loading cars, and it was necessary for him to break up such fragments of rock as required reduction by blows of a 16-pound sledge. Breaking

*Decision rendered, May 10, 1919. 180 Pac. Rep. 793. Syllabus by the Court.

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rock was hard work, and in order to earn fair wages when paid by the car it was necessary for a man to work very hard.

The injury occurred on November 1, 1916. In July and August, 1915, the deceased was incapacitated for work for eight weeks on account of typhoid fever. On the day of the injury his wife took his lunch to him at the quarry, and was with him from about 11 a. m. until noon. He seemed to be feeling well, was cheerful and in good spirits, and ate all of his lunch. In the afternoon, while at his working place, he was observed to be bending over and bleeding copiously. Streams of blood were gushing from his mouth and nostrils, and he died before medical aid could reach him. Shortly before the hemorrhage occurred, he was beating a rock weighing between 500 and 1,000 pounds with his sledge. A physician testified as follows:

"Q. What would you say with reference to a man working three years in the sacking department of the Ash Grove Lime & Portland Cement Company, and after working there about three years going into the quarry to load rock, breaking big limestone rock with a 16-pound sledge hammer—what, if any, effect would that have to produce a hemorrhage? Would it, or not, produce a hemorrhage?

"A. I think a person who had worked for three years in that sacking department could expect almost anything from it.

"Q. You may state to the jury now whether it would be likely to cause hemorrhage, working in the quarry, breaking rock with a 16-pound sledge and loading it.

"A. It might possibly do it.

"Q. In your judgment would it have a tendency to do it?"

"A. Yes, sir; I think so."

The defendant justifies the ruling sustaining the demurrer to the evidence on the ground the workman did not suffer personal injury "by accident" within the meaning of the compensation act, which at the time provided as follows:

"If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act." Gen. Stat. 1915, § 5896.

The word "accident" does not have a settled legal signification. It does have, however, a generally accepted meaning, which is the same whether considered according to the popular understanding or the approved usage of language. An "accident" is simply an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force. The word "undesigned" must not be taken too literally in this connection because a person may suffer injury accidental to him, under circumstances which include the design of another. The same warning may be extended regarding other elements of the definition; but, as definitions go, the one here proposed is correct, at least for present purposes. In this instance all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. While no one saw the workman strike a blow with his heavy sledge or lift a heavy piece of rock the moment before the hemorrhage occurred, the circumstances were clearly such that the jury would have been authorized to relate the hemorrhage to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the pulmonary blood vessel by force from within was as distinctly traumatic as if the canal had been severed by the violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed, the deceased was working in the manner habitual to the employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly

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and unpremeditatedly occurred, and presence of all the essential attributes of accident cannot be gainsaid.

The defendant insists a sharp distinction must be made between "injury" as one thing, and "accident" producing it as another thing. Some courts that have made this distinction have confined casualty to antecedent cause alone, and have held that compensation may not be made for injury resulting from the intentional performance of usual acts in the usual way. The question arose in England under the compensation act, the words of which were adopted by our own Legislature in 1911. "Personal injury by accident arising out of and in the course of employment." Laws 1911, c. 218, § 1.

In the case of Fenton v. Thorley & Co., Limited, Appeal Cases 1903, p. 443, the House of Lords considered and disposed of the question. A workman employed to turn the wheel of a machine felt something which he described as "a tear in his inside," and examination disclosed a rupture. There was no evidence of any slip or wrench or sudden jerk. The injury occurred while the man was engaged in his ordinary work, and in doing, or trying to do, the very thing he aimed to accomplish. The quoted provision was interpreted in the light of the manifestly beneficial and remedial purpose of the compensation act. The ordinary and popular meaning of the word "accident," as denoting mishap or untoward event not expected or designed, was accepted and applied, and it was held the expression "injury by accident" meant simply accidental injury, or accident in the popular sense. In the judgment delivered by Lord Macnaghten, reversing the court of appeal and directing an award of compensation, it was said:

"If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him. * * *

"There is a recent decision of the court of session in Scotland to which I should like to call your Lordships' attention, and in which I agree entirely. It is the case of Stewart v. Wilsons & Clyde Coal Co., Ltd. (5 F. 120). A miner strained his back in replacing a derailed coal hutch. The question arose, Was that an accident? All the learned judges held that it was. * * * What the miner did in replacing the hutch he certainly did deliberately and in the ordinary course of his work. There was nothing haphazard about it. Lord McLaren observed that it was impossible to limit the scope of the statute. He considered that 'if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in' * * * 'this is accidental injury in the sense of the statute.' Lord Kinnear observed that the injury was 'not intentional' and that 'it was unforeseen.' 'It arose,' he said, 'from some causes which are not definitely ascertained, except that the appellant was lifting hutches which were too heavy for him. If,' he added, 'such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it.'" Pages 446, 449.

Lord Robertson expressed himself in the Fenton Case as follows:

"It is not disputed that this man, being a person of ordinary strength, suffered personal injury while working at his employer's business, and because he applied such force to his work as to rupture him. Nor is it suggested that he hurt himself intentionally. The plain fact is that he miscalculated or by inadvertence did not compare the relative resisting forces of the wheel and his body. In this state of facts I am of opinion that this personal injury arose by accident out of and in the course of the man's employment, in the sense of the 1st section of the workmen's compensation act. * * * In the present instance the man by an act of overexertion broke the wall of his abdomen. Suppose he had by the same act broken

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his leg, the question would be the same. But suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental. Yet the argument against the application of the act is in this case exactly the same—that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence to them, which is the element of mischance, mishap, or misadventure." Pages 451, 452.

Lord Lindley said:

"The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident." Page 453.

The same question arose in what is known as "the spanner case," Clover, Clayton & Co., Limited, v. Hughes, decided by the House of Lords in 1910 (A. C. 242). The workman suffered from an aneurism. While engaged in tightening a nut with a spanner he fell dead from a rupture of the aneurism. In the opinion delivered by Lord Loreburn it was said:

"This man died from the rupture of an aneurism, and 'the death was caused bv a strain arising out of the ordinary work of the deceased operating upon a condition of the body which was such as to render the strain fatal.' Again, 'the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture.' These are the findings and they bind us.

"The first question here is whether or not the learned judge was entitled to regard the rupture as an 'accident' within the meaning of this act. In my opinion he was so entitled. Certainly it was an 'untoward event.' It was not designed. It was unexpected in what seem to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it. * * * No doubt the ordinary accident is associated with something external—the bursting of a boiler, or an explosion in a mine, for example. * * * I think it may also be something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident. * * * That, of itself, does not dispose of the case. It establishes that there may have been an injury by accident caused to the workman. But it does not establish that the accident was one 'arising out of the employment.' * * * I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. * * * An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. * * * In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone, or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from

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overnice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?" Pages 245, 246, 247.

In the opinion delivered by Lord Macnaghten it was said:

"My Lords, in this case your Lordships have heard a very able and ingenious argument upon the construction of the 1st section of the workmen's compensation acts. I need hardly say that it is not from any want of respect to the learned counsel who advanced it that I pass that argument by. It has been disposed of already. It was advanced and rejected in the case of Fenton v. Thorley (A. C. [1903] 443). There the court of appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence cannot be called an accident. There must be, it was said, an accident and an injury; you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that 'injury by accident' meant nothing more than 'accidental injury' or 'accident,' as the word is popularly used. * * *

"Now, in the present case, I have no doubt that there was an accident in the popular sense of the word. The man ruptured an aneurism in his aorta. An aneurism, as I understand it, is an unnatural or abnormal dilatation of an artery; but still it is a part of the artery, and so a part of the man's body. The man 'broke part of his body,' to borrow Lord Robertson's expression in Brintons v. Turvey (A. C. [1905] 230), and he certainly did not mean to do it.

"That the accident, if it was an accident, occurred in the course of the man's employment cannot be disputed. He was at his ordinary work at the time.

"The real question, as it seems to me, is this: Did it arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think there was sufficient evidence to support that finding, though I do not say I should have come to the same conclusion myself. 'The death,' the learned judge says, 'was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.' The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him." Pages 247, 249.

These opinions prevailed, and the appeal, which was taken from a judgment of the court of appeal affirming an award of compensation, was dismissed.

Space has been given to the foregoing quotations because they exhaust the subject, and because they fixed the meaning of the terms used in the first section of the workmen's compensation act before their adoption by the Legislature of this state. Besides this, they express views which the court believes to be sound.

It seems quite clear that if, because of some unobserved defect, the car which the workman was loading had broken down under its weight of stone, the giving way of the physical structure of the car would have been called an accident. The jury might not have considered they derived much enlightenment from the physician's very indefinite statement that the workman might have expected almost anything after working in the dust of the defendant's sacking department for three years. Certainly he would not expect typhoid fever from cement dust. The evidence warranted a finding that the physical structure of the man gave way under the stress of his usual labor. He certainly did not intend to kill himself by breaking rock and loading cars at a price per car. He did not know, or in any event he was inattentive to, the limited power of his blood vessels to resist blood pressure aggravated by vigorous muscular effort. Out of this ignorance or miscalculation of forces came misadventure, and the term "accident" applies to what

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happened to him, as clearly as it would apply to what happened to the car had it broken down under the assumed circumstances.

The defendant insists that the workman died of disease; that is, the injury did not arise out of the employment. The question was one of fact, and should have been submitted to the jury. It is not material that the workman's blood vessels were weakened by disease, or that he was predisposed to hemorrhage because, for example, he had breathed the dust of the sacking department for three years. The statute establishes no standard of health for workmen, entitling them or their dependents to compensation, and if the added factor of physical exertion in the employment were required to effect the lesion, and did so, the injury arose out of the employment. That the injury occurred in that way, and is referable to a definite time, place, and circumstance, is indicated by the workman's apparent good health and strength, the suddenness and profusion of the hemorrhage, the absence of previous extravasation of blood, and other circumstances.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

All the Justices concurring.

SUPREME COURT OF KANSAS.

GOODWIN

v.

CUDAHY PACKING CO. (No. 22094.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REFUSAL TO ARBITRATE—RECOVERY.

In an action for compensation, the following facts were established: The plaintiff attempted to settle compensation by agreement. He consented to arbitration. He served notice he would not arbitrate before the establishment committee, representative of employer and workmen. The defendant refused to arbitrate except before that committee. The plaintiff made no application to the judge of the proper court for appointment of an arbitrator to settle the matter. *Held,* construing sections 10, 11, 12, and 20 of chapter 226 of the Laws of 1917, the action was maintainable notwithstanding the plaintiff's omission to apply for appointment of an arbitrator.

(For other cases, see Master and Servant, Dec. Dig. § 398½, New, vol. 7A Key-No. Series)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ASCERTAINABLE BY OBJECTIVE EXAMINATION.

The evidence considered, and *held,* the workmen's injury was ascertainable by objective examination within the meaning of section 20 of chapter 226 of the Laws of 1917, providing that in no case shall a lump sum judgment be rendered for any injury not ascertainable by objective examination.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

*Decision rendered, May 10, 1919. 180 Pac. Rep. 809. Syllabus by the Court.

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Appeal from District Court, Wyandotte County.

Action by William Goodwin against the Cudahy Packing Company, for compensation under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Affirmed.

McFadden & Claflin, of Kansas City, for appellant.
W. W. McCanless, of Kansas City, for appellee.

BURCH, J. The action was one for compensation. The plaintiff recovered, and the defendant appeals.

The following facts were established by findings of the jury: The plaintiff attempted to settle compensation by agreement. He consented to arbitration. He served notice he would not arbitrate before the establishment committee, representative of employer and workmen. The defendant refused to arbitrate except before that committee. The plaintiff made no application to the judge of the proper court for appointment of an arbitrator to settle the matter.

[1] The defendant insists that application by the workman for court appointment of an arbitrator was a condition precedent to resort to the remedy by action.

Chapter 226 of the Laws of 1917 contains the following, among other provisions:

"Compensation due under this act may be settled by agreement." Section 10.

"If compensation be not so settled by agreement: (a) If any committee representative of the employer and the workman exists, organized for the purpose of settling disputes under this act, said committee shall have the power to adopt rules governing its procedure and action, and the matter shall, unless either party objects by notice in writing delivered or sent by registered mail to the other party before the committee meets to consider the matter, be settled in accordance with said rules by such committee or by an arbitrator selected by it. (b) If either party objects or there is no such committee, or the committee or the arbitrator to whom it refers the matter fails to settle it within sixty days from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or appointed by any judge of a court where an action might be maintained upon the written application of either party to said court. The consent to arbitration shall be in writing and signed by the parties, and may limit the fees of the arbitrator and the time within which the award must be made, and unless such consent or order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue, but either party shall have the right to require that the arbitrator shall also find the character and quality of the disability and the period for which payments of compensation shall continue in accordance with the provisions of this act." Section 11.

"The committee or arbitrator shall not be bound by technical rules of procedure or evidence but shall give the parties reasonable opportunity to be heard and to present evidence, and shall act reasonably and without partiality, and shall make and file an award, with the consent to arbitration or the order of the court appointing the arbitrator attached, in the office of the clerk of the proper district court within sixty days. * * *" Section 12.

"A workman's right to compensation under this act may, in default of agreement or if the employer shall have refused to consent to an arbitration of the workman's claim for compensation, be determined and enforced by action in any court of competent jurisdiction, but no such action shall be maintained until and unless the workman shall have consented to an arbitration or applied to the court as hereinbefore provided for an arbitrator." Section 20.

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The varieties of conduct which may be displayed by both employer and workman are so numerous that it would be impossible to anticipate all of them and apply the statute to all of them. Therefore the interpretation of the statute will be limited for the present to a few general observations essential to decision of the particular question presented.

Broadly speaking, the statute contains substantive and adjective provisions. The substantive provisions relate to settlement of compensation by agreement and settlement of compensation by arbitration. The adjective provisions relate to selection of an arbitrator, in default of settlement of compensation by agreement, and to action for compensation, in default of agreement and arbitration.

It is contemplated that compensation shall be settled by agreement or by arbitration, and without litigation. If there be an agreement, that ends the matter. In default of agreement, the statute requires compensation to be settled by arbitration, and employer and workman are expected to sign a writing, expressing such consent and stipulating respecting matters which they desire to be referred. The language of section 11 is that if the establishment committee be set aside as arbitrator, "the matter shall be settled by a single arbitrator," etc. In the statute which was superseded by the act of 1917 the language was "the matter may be settled," etc. Gen. Stat. 1915, § 5918. The result is, it is wrongful for either employer or employe to refuse to arbitrate in case of failure to agree on compensation.

The workman must consent to arbitration, or go without compensation. If the employer consent, arbitration is compulsory upon the workman. If the employer withhold consent to arbitration, the workman must nevertheless have consented, or he, too, is at fault, and is denied remedy by action. If the employer refuse to consent to arbitration, the workman who has consented is not precluded from compensation, but has a remedy by action.

If, in default of agreement, the workman consent to arbitration and the employer do not refuse to consent, the arbitrator shall be the establishment committee. Either the employer or the workman may object to the committee as arbitrator. In that event a single arbitrator, selected by agreement, shall act. In default of agreement on an arbitrator, either party may apply to the proper court—technically the judge of the proper court—for the appointment of an arbitrator who shall settle the matter. The remedy of application to the court for appointment of an arbitrator is a last resort. The establishment committee has precedence as arbitrator. That committee having been set aside, the parties should agree. In default of agreement, a court appointment should be applied for, in order that arbitration may not fail.

The establishment committee having been set aside and no agreement on an arbitrator having been reached, the workman must perfect the machinery of arbitration by applying for appointment of an arbitrator, or he will be precluded from enforcing compensation by action. If, however, at any stage of the proceedings, the employer definitely refuse to consent to arbitration, the workman who, in default of agreement on compensation, has consented to arbitration need not go further with arbitration. The statute does not require him to do futile things. He cannot be at fault for not procuring appointment of an arbitrator when such appointment would be useless on account of the declared attitude of the employer.

Summing up, the conditions upon the workman's resort to the remedy by action are these:

(1) In default of agreement settling compensation, he must have consented to arbitration.

(2) He must have applied to the court for the appointment of an arbitrator, when arbitration would otherwise fail.

(3) The employer must have refused to consent to arbitration.

Applying the principles just stated to the present controversy, the

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workman attempted to settle compensation by agreement. In default of agreement he consented to arbitration. He had the statutory right to object to the establishment committee as arbitrator, and did so. The defendant refused to arbitrate before any arbitrator except the establishment committee, and so rendered any further effort on the part of the plaintiff to secure arbitration useless and unnecessary. Therefore the workman was not at fault, and was entitled to maintain the action.

[2] The judgment was for a lump sum. The defendant insists that judgment should have been one for periodical payments, because the injury was not ascertainable by objective examination. The statute reads as follows:

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for, periodical payments, as in an award; provided, in no case shall a lump sum judgment be rendered for any injury not ascertainable by objective examination, but in such cases the court may order periodical payments during incapacity of such sums as may be due under the provisions of section 4 of this act and such judgment may be reviewed at any time after the expiration of six months upon application of either party and the amount allowed by the court reduced or raised in accordance with the evidence introduced at the time of such review." Laws 1917, c. 226, § 20.

There was evidence that the injury resulted from a knife cut just above the wrist on the left arm. It took eight stitches to close the wound. The plaintiff was unable to work for seven months, and his arm bothers him in lifting and grabbing. While this evidence was properly received for other purposes, none of it could be considered for the purpose of determining the nature of the judgment, whether for a lump sum or for periodical payments. That question could be determined by objective examination only.

A physician testified as follows:

"On examination, I found a scar a little above the wrist on the left arm, and on inquiry as to how that scar came, he told me that it was a knife cut as I remember, and the examination of the hand disclosed the fact that the thumb on the left side—the tendon does not draw the thumb down into the hand as well as on the right side; there is some loss of motion and grab in the left hand, probably due to the severing of the tendon that affects the thumb. * * * The grab in the left hand is some less than it should be, for a right-handed man, in the left hand.

"Q. Now, are you able to state, doctor, whether there were any tendons or muscles cut there?

"A. Well, one would suppose from the length of the scar and from the condition that the hand is left in now, that there was.

"Q. State whether or not that tendon has been brought together again.

"A. Yes; evidently the tendon has been brought together, and it does not work as freely as it should because it has gotten the scar there."

Eliminating the history of the case and eliminating the physician's inferences and conclusions, the examination disclosed a scar, disclosed a tendon the free movement of which was inhibited by the scar and which did not draw the thumb down into the hand, and disclosed loss of motion and grab. These facts were ascertainable, and were ascertained by inspection and manipulation alone, purely objective means, and were sufficient to sustain a lump sum judgment.

The judgment of the district court is affirmed.

All the Justices concurring.

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COURT OF APPEALS OF KENTUCKY.

LAMBERG

v.

CENTRAL CONSUMERS' CO.*

1. MASTER AND SERVANT—INJURIES TO SERVANT— DIRECTION OF VERDICT.

Where the evidence is equally consistent with the existence or nonexistence of negligence on the part of the master, direction of verdict for the master is proper.

(For other cases, see Master and Servant, Dec. Dig. § 286[1].)

2. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—DIRECTION OF VERDICT.

In a servant's action for injuries, plaintiff's testimony *held* not open to the construction, justifying direction of verdict for defendant, that the injury was caused by plaintiff's ankle having turned "through no defect in the floor."

(For other cases, see Master and Servant, Dec. Dig. § 285[1].)

3. MASTER AND SERVANT—INJURIES TO SERVANT—SAFETY OF WORKING PLACE.

Whether or not a place is reasonably safe for a servant to work in depends on the character of the work.

(For other cases, see Master and Servant, Dec. Dig. § 107[2].)

4. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE AND PROXIMATE CAUSE—QUESTIONS FOR JURY.

In a servant's action for injuries while lifting a heavy cask, whether the master was negligent in failing to furnish a reasonably safe place, the floor being rough and uneven, and whether injuries proximately resulted from such negligence, *held* for the jury.

(For other cases, see Master and Servant, Dec. Dig. § 286[3].)

5. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—ABOLITION OF DEFENSES.

If accident occurred, after the Workmen's Compensation Law became effective, the defenses of contributory negligence and assumed risk are not available to the employer, who had not accepted the provisions of the law.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Fred W. Lamberg against the Central Consumers' Company. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded for new trial.

Isaac Sherman, of Louisville, for appellant.
Kohn, Bingham, Sloss & Spindle, of Louisville, for appellee.

*Decision rendered, May 16, 1919. 211 S. W. Rep. 746.

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CLARKE, J. The appellant, who was plaintiff below, instituted this action to recover damages for personal injuries alleged to have resulted from the defendant's negligently requiring him, over his protest and upon assurance of safety, to perform services without sufficient help and in a place not reasonably safe for the work.

Although other questions are argued, the vital one here is whether the court erred at the completion of plaintiff's testimony in sustaining defendant's motion for a directed verdict. Plaintiff was directed by his superior to assist him in raising from the floor one side of the top of a beer cask, and placing thereunder an ordinary wooden "horse." He protested that the task required more than two men and that the floor where the work was to be done was not reasonably safe for the purpose; but, upon assurance that there was no danger to him in their doing the work at the place and without assistance, he helped his superior to lift the load, in doing which he claims to have been injured.

He testified in substance that the cask top weighed in his judgment somewhere about 800 or 1,000 pounds; that the floor where he was required to stand was made of planks which had become worn and warped until the floor was rough and uneven, and some planks were as much as 2 inches below the level of others adjoining them; that in helping to lift the load he was caused by its weight to shift his feet to maintain his balance; that in so doing he could not see where he was stepping and injured his ankle to such an extent that his foot had to be amputated, either by stepping in one of the holes or depressions in the floor, "or my ankle turned on that account." Counsel for defendant then asked him, "On what account?"—to which he replied:

"On account of the rough floor there, stepping in the hole. I could not see what I was doing with the weight in my hands."

Later in his cross-examination he was asked and answered:

"Q. Now, Mr. Lamberg, did you injure your foot because your ankle turned, or because you stepped in the hole, or because this board sagged with you? A. I could not say exactly which one it was. It was either one or the other, as I stated there."

[1, 2] Upon the theory that plaintiff's testimony was in effect that his injury resulted, either from his ankle having turned "through no defect in the floor," or because of such a defect, the court gave the peremptory instruction for the defendant under the thoroughly established rule that, where the evidence is equally consistent with the existence or nonexistence of negligence, such an instruction is proper. We are, however, of the opinion the court was in error in the effect given to plaintiff's testimony as to the cause of his injury, as we do not think it is susceptible of the construction that the injury was caused by his ankle having turned "through no defect in the floor" or because of such a defect. He stated rather, when attempting to explain just what caused his injury, that it was caused by his stepping in one of the holes or his ankle turned "on account of the rough floor there, stepping in the hole." This clearly means that his injury resulted, either directly from stepping in a depression in the floor, such as he had described, or else from his ankle turning as a result of having stepped in such a depression, and does not permit of the construction, placed upon it by the court, that his ankle may have turned "through no defect in the floor." And this is true notwithstanding his later statement, quoted above, that he did not know exactly what caused his injury, but that "it was either one or the other (of the three ways stated by counsel) as I stated there," since he had only stated that, if his injury resulted from his ankle turning, his ankle was caused to turn by the depressions in the floor, and he nowhere stated that his ankle might have turned "through no defect in the floor."

It is therefore apparent that the ground upon which the court rested the peremptory instruction is untenable; but we must still determine whether or not the evidence for plaintiff is sufficient to show the place

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was not reasonably safe for the work plaintiff was required to do there, since, unless so, no negligence was proven and the instruction was authorized.

[3, 4] Whether or not a place is reasonably safe necessarily depends, of course, upon the character of the work that is to be performed, since manifestly a floor might be reasonably safe as an ordinary walkway or driveway that would be quite unsafe for many other purposes; hence here the floor must be considered solely with reference to the character of the work plaintiff was required to perform thereon, and we are unwilling to hold as a matter of law that such a floor as plaintiff described was a reasonably safe place upon which to attempt to lift a heavy weight with only one assistant, as under such circumstances reasonable men might differ as to whether or not in the exercise of ordinary care there must have been contemplated a possible necessary shifting of the feet in lifting so heavy a weight and a resultant danger therefrom. Therefore we conclude there was sufficient evidence to carry the case to the jury on the question of defendant's negligence in failing to furnish a reasonably safe place for the plaintiff to perform the work required of him; as there was also upon the question of whether or not his injuries proximately resulted therefrom. Hence the court erred in directing a verdict for the defendant.

[5] 2. We are precluded from considering plaintiff's evidence under the pleaded defenses of contributory negligence and assumed risk, since these defenses were not available to defendant if, as pleaded by plaintiff, the accident occurred after the Workmen's Compensation Law (Laws 1914, c. 73) became effective, because defendant admits it had not at the time accepted the provisions of that law. However, these defenses were available to the defendant if, as pleaded by it, the accident occurred before and not after that law went into effect, since it is only under its provisions that such defenses are denied defendant; hence the court did not err in overruling plaintiff's demurrers to and motions to strike the third and fourth paragraphs of defendant's answer pleading such defenses.

For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial consistent herewith.

COURT OF APPEALS OF KENTUCKY.

WEST KENTUCKY COAL CO.

v.

SMITHERS.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION.

Under Ky. St. Supp. 1918, § 4960, a coal mining company which had not elected to operate under the Workmen's Compensation Act at the time of an accident to an employe cannot defend on the usual grounds of contributory negligence, negligence of a fellow servant, and assumption of risk.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

*Decision rendered, May 9, 1919. 211 S. W. Rep. 580.

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2. MASTER AND SERVANT—INJURY TO SERVANT—RULE OF EMPLOYMENT—CONSTRUCTION.

A coal mining company's rule that no employees except those connected with the operation of the motor or trip would be allowed to ride on a locomotive or trip of loaded cars, etc., *held* to apply only to motors or cars drawn by motor, and not to a single car drawn by a mule.

(For other cases, see Master and Servant, Dec. Dig. § 145.)

3. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULE.

Where an employe's violation of the master's rules contributes to his injuries as a proximate cause thereof, it is contributory negligence, a defense which a master, who has not elected to operate under the Workmen's Compensation Act, cannot set up.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

4. MASTER AND SERVANT—INJURY TO SERVANT—ANTICIPATING PRESENCE ON COAL CARS—COLLISION.

A mining company, in not applying brakes to empty coal cars to prevent them from running downgrade, was not guilty of negligence rendering it liable to a track layer riding on a loaded mule-drawn car with which the empties collided, unless he had the right to be on the car, and company was charged with duty of anticipating his presence, a question depending on custom of employes not connected with operation of cars to ride with knowledge of those in charge.

(For other cases, see Master and Servant, Dec. Dig. § 136.)

Appeal from Circuit Court, Union County.

Action by Ed Smithers against the West Kentucky Coal Company. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded for new trial consistent with the opinion.

Allen, Harris & Allen, of Morganfield, and P. H. Winston, of Sturgis, for appellant.

Drury & Drury, G. E. Jones, W. T. Drury and G. L. Drury, all of Morganfield, for appellee.

CLAY, C. In this action for damages for personal injuries, plaintiff, Ed Smithers, recovered of the defendant, West Kentucky Coal Company, a verdict and judgment for $1,297.50. The defendant appeals.

The defendant operates certain coal mines in Union county. Plaintiff was employed as a track layer in mine No. 8. The work in the mines was discontinued about noon on the day of the accident, for the purpose of giving the employes an opportunity to attend a circus. For the purpose of getting out of the mine, plaintiff got on a loaded coal car drawn by a mule and took a seat by the driver. While en route, a string of empty cars that had been placed on the lieway ran downgrade, because the brakes that had been set were not sufficient to hold them, and collided with the car on which plaintiff was riding. Both the mule and the driver avoided the danger, but plaintiff was thrown from the car and injured.

It further appears that pursuant to the authority of subsection 1, § 2738b, Kentucky Statutes, the defendant had adopted certain special rules for the government and operation of its mines, which rules were approved in writing by the chief inspector of mines, and duly posted in certain conspicuous places about the mine in which plaintiff was employed. Rule 5 provides:

"No employes except those connected with the operation of the motor or trip, will be allowed to ride on the locomotive or trip of loaded cars, and all others are strictly forbidden to get off or on any motor trip while the same is in motion. Motormen must not allow any one

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to ride on the motor or cars except by the express permission of the foreman."

There was some evidence that this rule was habitually disregarded with the knowledge and acquiescence of those in charge of the mine.

The petition charged that plaintiff's injuries were caused by negligence of the defendant, its agents and servants. In its answer, the defendant denied negligence and charged that plaintiff's injuries were caused solely by his own negligence and willful misconduct.

[1] It is admitted that the defendant had not elected to operate under the Workmen's Compensation Act at the time of the accident, and cannot, therefore, defend on the usual grounds of contributory negligence, negligence of a fellow servant, and assumption of risk. Section 4960, vol. 3, Kentucky Statutes.

In its instructions to the jury, the court assumed that plaintiff, in riding on the loaded car, was in a place where he had a right to be, and told the jury, in substance, that the defendant was under the duty to use reasonable care in placing its empty cars so that they would not run down the incline, and that if it failed to use such care, and by reason thereof plaintiff was injured, they should find for plaintiff.

[2] Defendant contends that the rule above quoted forbade plaintiff from riding on the loaded car, and that his violation of this rule was such willful misconduct on his part as to prevent a recovery. On the other hand, plaintiff contends that the rule in question was not applicable; and, furthermore, that even if it was applicable, his violation thereof constituted contributory negligence, a defense cut off by the statute. Of course, the construction of the rule in question is for the court, and, while it should be construed so as to carry out the purpose of its adoption, its scope should not be extended to include cases not embraced in the language employed. While the company might have adopted a rule forbidding employes, whose work was not connected with the operation of cars, from getting on all loaded cars, whether transported by a motor or otherwise, an examination of the language employed shows that it is not sufficiently broad for that purpose. Evidently that company regarded the riding on the motor or on cars drawn by a motor as especially dangerous, and the rule was adopted to meet this condition. In the first place, the rule applies to all employes "except those connected with the operation of the motor or trip." Such employes are forbidden "to ride on locomotive or trip of loaded cars." Not only so, but the rule provides that—

"All others are strictly forbidden to get off or on any motor trip, while the same is in motion."

Even this is not all. The rule goes further and provides that—

"Motormen must not allow any one to ride on the motor or cars except with the express permission of the foreman."

It will thus be seen that, throughout the rule, the words, "motor," "trip," "locomotive," "trip of loaded cars," "motor trip," and "motormen" are especially emphasized. We therefore conclude that the rule applies only to motor or cars drawn by a motor, and does not apply to a single car drawn by a mule. That being true, plaintiff did not violate the rule in question.

[3] Aside from this, it was generally held at the time of the adoption of the Workmen's Compensation Act (Ky. St. Supp. 1918, §§ 4880-4987), that, where an employe's injuries were caused by his violation of a rule promulgated by the master, he was guilty of contributory negligence. The cases proceed on the theory that it is the duty of an employe to obey the rules, and a violation thereof is a breach of duty, and therefore negligence, and, where such violation contributes to his injuries as a proximate cause thereof, it is contributory negligence. In St. Louis & S. F. R. Co. v. Dewees, 153 Fed. 56, 82 C. C. A. 190, the court said:

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"Where the duties of a servant in given circumstances are particularly specified in the unambiguous and reasonable rules of the master, of which the servant has knowledge and to which he has assented by entering and continuing in the service, his nonobservance or disobedience of them at a time when they are capable of observance is negligence as matter of law, and is not to be judged by the undefined and varying requirements of ordinary care."

And such is the prevailing view of the question. 18 R. C. L. § 152. p. 600; Elmgren v. Chicago, M. & St. P. R. Co., 102 Minn. 41, 112 N. W. 1067, 12 L. R. A. (N. S.) 754; St. Louis, etc., R. Co. v. Dupree, 84 Ark. 377, 105 S. W. 878, 120 Am. St. Rep. 74; Ann. Cas. 1912A, 91, note; C., N. O. & T. P. R. Co. v. Lovell's Adm'r, 141 Ky. 249, 132 S. W. 569, 47 L. R. A. (N. S.) 909; Cincinnati, etc., R. Co. v. Silvers, 126 S. W. 120; Ford v. Chicago, R. I. & P. R. Co., 91 Iowa, 179, 59 N. W. 5, 24 L. R. A. 657 and note. Since the violation of a rule that contributes to the employe's injuries, as a proximate cause thereof, is contributory negligence, it necessarily follows that the defendant was not entitled to a peremptory instruction because of such violation.

[4] But back of all this is the question of defendant's negligence. To establish negligence on the part of the master, it is not sufficient for the injured employe to show that there was a violation of a duty owing to another person or class of persons, which, had it been performed, would have prevented the injury complained of. It must further appear that there was a violation of a duty owing to the plaintiff personally, or to a class to which he bore the necessary relation to make the duty applicable to him. 20 R. C. L. § 41, p. 47; Komonvi v. Consolidation Coal Co., 182 Ky. 683, 206 S. W. 883. Thus, it has been said that facts which create a relation, and therefore a duty, as to one, do not establish the same obligation to all mankind. To be within the right created, the complaining party must show facts which make the reason for claiming the relation applicable to him. Garland v. Boston, etc., Railroad, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N S.) 338, Ann. Cas. 1913E, 924. While it may be true that the defendant, in not applying the brakes to the empty cars so as to prevent them from running down the grade, was guilty of negligence as to the drivers of loaded cars or other persons having a right to be on the cars, it was not guilty of negligence as to the plaintiff unless the plaintiff had the right to be on the loaded car at the time of the injury, and the defendant was charged with the duty of anticipating his presence there. This question, in turn, depends on whether it was customary for employes, not connected with the operation of cars, to ride on loaded cars with the knowledge of those in charge of the mine, in going in, out of, or about the mine. There being some evidence to this effect, defendant was not entitled to a peremptory instruction on the ground that it owed no duty to plaintiff. However, the court erred in assuming in its instructions as a matter of law that defendant was negligent as to plaintiff in not applying the brakes on the empty cars, so as to prevent them from running down the grade, instead of making the question of negligence depend on whether it was customary for trackmen, not connected with the operation of cars, to ride on loaded cars with the knowledge of those in charge of the mine, in going in, out of, or about the mine. On another trial, the court will amend its instructions so as to conform to the view herein announced.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

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SUPREME COURT OF LOUISIANA.

MACK

v.

LEGEAI. (No. 23092.)*

MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—AWARD FOR TEMPORARY TOTAL OR PERMANENT PARTIAL DISABILITY.

Where injury to a servant's knee has caused a temporary total disability, and the evidence is that it will cause a permanent partial disability, he is entitled to an award under Employers' Liability Act, § 8, cls. (a) or (c), for the entire period of his disability not exceeding 300 weeks, less the number of weeks for which he has received compensation, the amending of section 8 by Acts 1916, No. 243, having merely made general provision for compensation for serious permanent injury not falling within any of the provisions already made.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Provosty, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Suit for compensation under the Employers' Liability Act by John Mack against James J. Legeai. From the judgment awarding compensation, plaintiff appeals. Judgment amended by increasing the term of payment.

H. W. Robinson and Howell Carter, Jr., both of New Orleans, for appellant.

Edward Rightor, of New Orleans, for appellee.

O'NIELL, J. This is a suit for compensation, under the Employers' Liability Act, the Act No. 20 of 1914, as amended by Act No. 243 of 1916. Plaintiff suffered an injury to his knee, which rendered him temporarily unable to do work of any character, and which has permanently disabled him seriously. The question is whether he should be compensated for the inability to work, according to the original provisions of the statute, or be compensated only for having "the usefulness of a member or physical function seriously permanently impaired" according to the amendment of 1916.

The new paragraph which was added to section 8 of the statute by the amending act of 1916, and which the defendant employer invokes as the law of this case, is this:

"In cases not falling within any of the provisions already made, where the employee is seriously permanently disfigured about the face or head or where the usefulness of a member or any physical function is seriously permanently impaired, the court of proper jurisdiction as hereinafter provided may allow such compensation as is reasonable in proportion to the compensation hereinabove specifically provided in the cases of specific disabilities above named, not to exceed fifty per centum of wages during one hundred weeks."

A careful analysis of section 8 of the statute, as amended, convinces

*Decision rendered, May 5, 1919. 81 S. Rep. 694. Syllabus by Editorial Staff.

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us that the new paragraph, making provisions for "cases not falling within any of the provisions already made," applies only to cases of injuries that do not produce disability to work.

As originally enacted, the statute provided only for injuries producing disability to work. Recognizing that there were, of course, only four general classes of disability to work, the Legislature placed them in four separate subsections of section 8, viz.: (a) Injury producing temporary total disability to do work of any reasonable character; (b) injury producing temporary partial disability; (c) injury producing permanent partial disability; and (d) injury producing permanent total disability to do work of any character.

The special provisions for certain specified "permanent partial disabilities," *i.e.*, for loss of a thumb, finger, toe, hand, arm, foot, leg, or eye, where appropriately placed in subsection (c). And, at the end of that subsection, it was declared, appropriately, that the loss of both hands, both feet, both eyes, or a hand and a foot, should constitute total permanent disability, to be compensated according to the provisions of subsection (d).

The four subsections, (a), (b), (c), (d), therefore, made provision for each and every class of physical disability to work. The statute, however, made no provision for an injury that did not produce disability to work. That was recognized in the case of Effie Boyer v. Crescent Paper Box Factory, 143 La. 367, 78 South, 596, where the plaintiff had suffered the loss of her scalp. And probably it was the notoriety of her case that brought about the amendment of the law, so as to provide compensation for an injury producing a serious permanent disfigurement of the face or head, or a serious and permanent impairment of the usefulness of any member or physical function, without regard for disability to work.

Defendant contends, and the district court has held, that the expression in the new paragraph of section 8, "in cases not falling within any of the provisions already made," refers to and excludes only the special provisions for the injuries specifically described in that subsection. Plaintiff contends, and we think correctly, that the idea was to make a general provision for compensation to be allowed for serious permanent injury, "in cases not falling within any of the provisions already made" in that or any other subsection of section 8.

What has caused the confusion and doubt as to whether the expression, "in cases not falling within any of the provisions already made," excludes the cases provided for in the general provisions of subsection (c), or excludes only the special provisions of the new subsection (d), is that the new paragraph providing for serious permanent injuries, without regard to disability to work, is placed in the same subsection with certain permanent partial disabilities that are specifically described; and they, in turn, are taken out of subsection (c) and put into a subsection of their own, as if it were possible to have five classes of disability to do work. There would be no room for misunderstanding if the new paragraph, making provision for serious permanent injuries, "in cases not falling within any of the provisions already made, had been given a separate section or subsection, or if the special provisions for the permanent partial disabilities specifically described had been left in subsection (c), where they belong.

If we should hold that the expression "in cases not falling within any of the provisions already made," does not exclude cases falling within the provisions of the first paragraph of the original subsection (c), retained in the amendment as subsection (c), that subsection, making provision for permanent partial disabilities, would have no meaning whatever.

It is certain that the first paragraph of subsection (c) of the original enactment would not have been retained as subsection (c) in the amendment if the Legislature had intended, by inserting the new paragraph making provision for "cases not falling within any of the provisions

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already made," to do away with the provisions of subsection (c). That subsection allows compensation, for permanent partial disability, at a rate one-half the difference between the wages which the injured employee was able to earn before and after the accident, subject to a maximum of $10 per week, for a period not exceeding 300 weeks. The new paragraph in the amending act declares that, "in cases not falling within any of the provisions already made," the court may allow compensation for an injury producing serious permanent disfigurement of the face or head or serious permanent impairment of any physical member or function, in proportion to the compensation allowed for those permanent partial disabilities specifically mentioned and provided for, but not exceeding half of the wages during 100 weeks. If we should adopt the district judge's construction of this new paragraph, holding that it applies to cases of permanent partial disability to do work, every case that falls within subsection (c) would also fall within subsection (d) of the amended act; for that subsection, after providing particularly for all of those permanent partial disabilities that are specifically described, would then provide generally for all other permanent partial disabilities. Where, then, would be the sense in subsection (c) allowing as compensation for a permanent partial disability one-half of the loss of wage earning capacity for a period not exceeding 300 weeks, if the general provisions of the new paragraph in section (d) of the amendment should limit the compensation to half wages for only 100 weeks, for every permanent partial disability not specifically provided for in that subsection?

The new paragraph in the amended act, however, bears evidence itself that the Legislature had no intention of stultifying the provisions of the first paragraph of the original subsection (c) retained as subsection (c) in the amended act, for subsection (d), in which appears the new paragraph, is the only one in which the term of payment of compensation is not limited to the period of disability. That is because the new paragraph, making provision for serious permanent disfigurement about the face or head, or serious permanent impairment of a physical function or member, applies only "in cases not falling within any of the provisions already made," and therefore has no application to any injury producing disability to work—either temporary or permanent, partial or total.

The injury suffered by the plaintiff in this case has caused a temporary total disability, and the evidence is that it will be a permanent partial disability. He is entitled to compensation under only one of the provisions of the act. It is admitted that he is entitled to $10 per week, if entitled to anything, and the maximum period for payment of compensation is the same in either subsection, (a) or (c), *i.e.*, 300 weeks.

We see no reason why the statute should limit the term of payment of compensation as it does, for a permanent disability, either partial or total, to "the period of disability." It may be that the payments shall cease at the death of the injured employee if he should live a year or longer after the accident, but die within the other limitation, 300 weeks, in case of permanent partial disability, or 400 weeks in case of permanent total disability; for it seems that the statute provides for compensation to be paid the dependents of an injured employee only in the event of his death within one year after the accident. Be that as it may, according to the admission in the record, plaintiff is entitled to compensation at the rate of $10 per week, and, according to the language of the statute, he is entitled "to be paid for the period of disability, not exceeding 300 weeks." Having received the compensation for 15 weeks, he is entitled to be paid for the remaining period of his disability, not exceeding the remainder of the 300 weeks.

The judgment appealed from is amended by increasing the term of payment of the compensation to be paid plaintiff by defendant, at $10 per week, from 85 weeks to the entire period of his disability, not ex-

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ceeding 285 weeks, dating from September 14, 1917. Defendant is to pay all costs of this suit.

Monroe, C. J., not having heard the argument, takes no part.

Provosity, J., dissents.

SUPREME JUDICIAL COURT OF MAINE

MAILMAN

v.

RECORD FOUNDRY & MACHINE CO. ET AL.*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INDUSTRIAL ACCIDENT COMMISSIONER AS TRIER OF FACTS.

By Rev. St. c. 50, § 34, in causes arising under the Workmen's Compensation Act, the chairman of the Industrial Accident Commission is made the trier of facts, and his decrees, in the absence of fraud, are final.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY—DETERMINATION OF ISSUES OF FACT.

The Workmen's Compensation Act is not violative of the Constitution in respect to the method provided by it for the exclusive determination of issues of fact, in the absence of fraud, by the chairman of the Industrial Accident Commission.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF.

On hearing before the Industrial Accident Commission, the claimant has the burden of proof.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW BY SUPREME JUDICIAL COURT—ERROR OF LAW.

A finding of any essential fact in favor of claimant by the chairman of the Industrial Accident Commission without proper evidence is an error of law reviewable by the Supreme Judicial Court, despite Workmen's Compensation Act, § 34.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SUPPORT OF DECREE—ESSENTIAL FACTS.

Under Workmen's Compensation Act, § 11, to sustain decree awarding compensation, it must appear that there was produced competent legal evidence that decedent died or was disabled as a result of (1) an accident arising (2) out of (3) and in the course of his employment by defendant.

(For other cases, see Master and Servant, Dec. Dig. § 405 [4].)

*Decision rendered, May 27, 1919. 106 Atl. Rep. 606.

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7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—HEARSAY.

In proceedings under the Workmen's Compensation Act, testimony heard by the Industrial Accident Commission, rehearsing the story of the accident as told by decedent to witnesses, was inadmissible hearsay.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ALLOWANCE OF HEARSAY EVIDENCE.

The allowance of hearsay evidence by the Industrial Accident Commissioner does not require the Supreme Judicial Court to reverse his decree, unless it was in whole or in part based on such incompetent testimony.

(For other cases, see aMster and Servant, Dec. Dig. § 417[8].)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE—RES GESTÆ.

Testimony was admissible before the Industrial Accident Commission, as part of the res gestæ, that when decedent was discovered he said, "I got hurt," and then or afterwards indicated where he was hurt, but was admissible only as tending to show decedent's physical condition at the time.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SUPPORT OR AWARD BY EVIDENCE.

There must be some competent evidence supporting an award of compensation under the Workmen's Compensation Act, and, though such evidence may be slender, it must be evidence, and not speculation, surmise, or conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

11. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW.

The Supreme Judicial Court will review the Industrial Accident Commissioner's reasoning as to the effect of or inferences from evidence, but, in the absence of fraud, will not review his findings as to the credibility and weight of testimony.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

13. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF COMMISSIONER'S FINDING.

If a state of facts is shown more consistent with the Industrial Accident Commissioner's finding than with any other theory, and the finding is supported by rational and natural inferences from acts proved or admitted, an appeal cannot be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

14. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT HASTENING DISEASE.

It is sufficient, to justify an award of compensation under the Workmen's Compensation Act, if by weakening resistance or otherwise an accident so influences the progress of an existing disease as to cause death or disability.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

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15. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF INJURY—SUPPORT BY EVIDENCE.

Finding of the Industrial Accident Commissioner that decedent sustained an injury, rather than died of disease, *held* supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405 [4].)

16. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—SUPPORT BY EVIDENCE.

Finding of the Industrial Accident Commissioner that the injury to the deceased employee arose out of and in the course of the employment *held* sustained by evidence; the employee having been left at work in a mirthful condition, and having been found the next morning injured and stating he was hurt.

(For other cases, see Master and Servant, Dec. Dig. § 405 [4].)

Appeal from Supreme Judicial Court, Androscoggin County, at Law.

Proceeding under the Workmen's Compensation Act by Helen B. Mailman, for compensation for the death of William Mailman, against the Record Foundry & Machine Company and another. There was finding for the dependent, and from the decree of a single justice of the Supreme Judicial Court, rendered in accordance with such finding, defendants appeal. Appeal denied, and decree affirmed.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, Wilson, and Deasy, JJ.

Andrews & Nelson, of Augusta, for appellants.
McGillicuddy & Morey, of Lewiston, for appellee.

DEASY, J. Proceeding under the Workmen's Compensation Act (Rev. St. c. 50). Helen B. Mailman, widow and dependent of William Mailman, alleges that her husband died from an "accident arising out of and in the course of his employment" by the Record Foundry & Machine Company.

William Mailman, a night watchman, went to work as usual on April 18, 1917. The following morning he was discovered at the foundry in a state of collapse. He developed pneumonia and peritonitis, and after a few days died. His dependent claimed that his pneumonia was traumatic —*i.e.*, the result of an injury—and that the injury was due to an accident sustained by the deceased while alone at the foundry on the night of the 18th. The chairman of the Industrial Accident Commission found in favor of the dependent. From the formal decree of a single justice rendered in accordance with such finding the defendants appeal. To avoid confusion we shall refer to the dependent as the plaintiff.

[1] *Jurisdiction.*—"His [chairman of Industrial Accident Commission] decision, in the absence of fraud, upon all questions of fact shall be final. * * * Such decree [decree of single justice in accordance with finding of chairman] shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said court, except there shall be no appeal therefrom upon questions of fact found by said commission or its chairman." R. S. c. 50, § 34.

In the absence of fraud this court is precluded by positive law from acting as a trier of facts. It does not review the facts. Another tribunal has final jurisdiction for this purpose. The Supreme Judicial Court finally determines questions of law. For this purpose its members, or a majority of them, sit as a court of law. It possesses this power, whether sitting as a court of common law or of equity, or to decide probate

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appeals, or appeals from quasi judicial tribunals like the Industrial Accident Commission. The Constitution does not and the Legislature cannot abridge this power.

But it does not in all cases finally determine questions of fact.

[2] In equity causes the court sitting in banc speaks the final word both as to law and fact. So in actions at common law reported by consent of parties. But in other common-law causes, with immaterial exceptions, the Constitution guarantees trials of fact by a jury; in probate appeals, under a system sanctioned by long usage and repeated decisions, a single judge passes finally on facts; and in causes arising under the Workmen's Compensation Act the chairman of the Industrial Accident Commission is by statute made the trier of facts, and his decrees are, in the absence of fraud, final.

[3] The constitutionality of a law vesting such a power in a tribunal not a court with a jury, and which is partly and perhaps primarily administrative, has been questioned.

The Maine Workmen's Compensation Act is elective. No employer or employee is bound to submit to it without his assent, actively or passively manifested. Substantially similar statutory provisions have been upheld generally by courts. State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; Cunningham v. N. W. Imp. Co., 44 Mont. 180, 119 Pac. 554; Borgnis v. Falk Co., 147 Wis. 327, 113 N. W. 209, 37 L. R. A. (N. S.) 489; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637; Sexton v. Newark Co., 84 N. J. Law, 85, 86 Atl. 451; Hunter v. Colfax Consol. Coal Co., 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803; Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Deibeikes v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; Sayles v. Foley (R. I.) 96 Atl. 340. For reasons which are in these cases mobilized in compelling force, we hold that the Maine Compensation Act is not violative of the Constitution in respect to the method by it provided for the exclusive determination of issues of fact.

[4] *Burden of Proof.*—In the hearing before the commission the plaintiff has the burden of proof. Von Ette's Case, 223 Mass. 59, 111 N. E. 696, L. R. A. 1916D, 641; Sanderson's Case, 224 Mass. 562, 113 N. E. 355.

[5, 6] For this reason a finding in favor of the plaintiff of any essential fact without proper evidence is an error of law. To sustain the decree it must appear that there was produced at the trial of facts competent legal evidence of three things, to wit, that the deceased died or was disabled as the result of (1) an accident arising (2) out of and (3) in the course of his employment by the defendant. R. S. c. 50, § 11.

Questions of Law Involved.—The defendants contend that the commissioner fell into errors of law in the following respects: (1) That he admitted incompetent, to wit, hearsay, testimony, and based his decree wholly or partly upon it; and (2) that he made his decree in favor of the plaintiff with no competent evidence supporting certain essentials of her case.

[7, 8] *Hearsay Testimony.*—The commissioner permitted witnesses to rehearse the story of the accident as told by the deceased. This was hearsay testimony, plainly inadmissible. But the allowance of hearsay evidence by the commissioner does not require this court to reverse his decree, unless such decree was in whole, or in part, based upon such incompetent testimony. Pigeon's Case, 216 Mass. 55, 102 N. E. 932, Ann. Cas. 1915A, 737; Derinza's Case, 229 Mass. 444, 118 N. E. 942; Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 249; Kinney v. Cadillac Motor Co., 199 Mich. 435, 165 N. W. 651.

Were the court convinced that hearsay influenced the decree, it would be required to sustain the appeal. We perceive, however, no sufficient reason for questioning the commissioner's statement that he made his finding of fact "wholly disregarding the hearsay evidence."

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[9] The commissioner permitted the introduction of testimony that when the deceased was discovered, on the morning of April 19, 1917, he said, "I got hurt," and then or afterward indicated where he was hurt. Counsel for plaintiff urges that this testimony was admissible as a part of the res gestæ. This contention is sound. It is admissible, but only as tending to show the physical condition of the deceased at the time.

If the man had been groaning or screaming, no law would forbid proof of such fact. The rule remains the same where pain finds articulate expression. Heald v. Thing, 45 Me. 394; Hutchins v. Ford, 82 Me. 378, 19 Atl. 832; Barber v. Merriam, 11 Allen (Mass.) 322.

But the effect of this testimony is limited by its purpose. It must be treated as an expression of present condition, and not as an abbreviated narrative of an occurrence in even the immediate past. Asbury Insurance Co. v. Warren, 66 Me. 529, 22 Am. Rep. 590; Gosser v. Ohio Valley Water Co., 244 Pa. 59, 90 Atl. 540, Ann. Cas. 1915C, 685; Peoria Cordage Co. v. Ind. Board, 284 Ill. 90, 119 N. E. 996, L. R. A. 1918E, 822; Boyd on Workmen's Compensation, 1123; Bradbury on Workmen's Compensation (2d Ed.) 800.

[10, 11] *Evidence Required to Support Decree.*—There must be some competent evidence It may be "slender." It must be evidence, however, and not speculation, surmise, or conjecture. Von Ette's Case, 223 Mass. 60, 111 N. E. 696, L. R. A. 1916D, 641; Sponatski's Case, 220 Mass. 528, 108 N. E. 466, L. R. A. 1916A, 333. While no general rule can be established applicabe to all cases, certain principles are clear:

If there is direct testimony which, standing alone and uncontradicted, would justify the decree, there is some evidence, notwithstanding its contradiction by other evidence of much greater weight.

If the case must be proved wholly or in part circumstantially, and there is a dispute as to what the circumstances are, the determination of such dispute by the commissioner is final. It is for the trier of facts, who sees and hears witnesses, to weigh their testimony and without appeal to determine their trustworthiness.

But the inferences which the commissioner draws from proved or admitted circumstances must needs be weighed and tested by this court. Otherwise it cannot determine whether the decree is based on evidence or conjecture.

In other words, the court will review the commissioner's reasoning, but will not, in the absence of fraud, review his findings as to the credibility and weight of testimony.

"In cases of this class the Supreme Court is not authorized to determine the preponderance or weight of testimony." Nevich v. Delaware, L. & W. R. Co., 90 N. J. Law, 230, 100 Atl. 234, L. R. A. 1917E, 847.

"On a review of the findings of the Industrial Board, the court does not pass on the weight of the evidence as to controverted facts." Albaugh-Dover Co. v. Ind. Board, 278 Ill. 179, 115 N. E. 834.

"Its conclusion [the commission's conclusion in matters of fact] is not subject to review by the courts, unless palpably contrary to the undisputed evidence." Frankfort Inc. Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150.

"We have said so often the real question is whether there is evidence in the record to support the finding, and that we are not concerned with the weight of evidence, that we shall not discuss the matter." Oniji v. Studebaker Corp., 196 Mich. 397, 163 N. W. 23.

See, also, Drtina v. Charles Tea Co., 281 Ill. 259, 118 N. E. 69; Larke v. Insurance Co., 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584; Lindsteadt v. Lumber Co., 190 Mich. 451, 157 N. W. 64; Bell v. Hayes-Inoia Co., 192 Mich. 90, 158 N. W. 179; Commonwealth Edison Co. v. Industrial Board, 277 Ill. 74, 115 N. E. 158; Interstate Co. v. Szot (Ind. App.) 115 N. E. 599; Lefens v. Ind. Comm., 286 Ill. 32, 121 N. E. 182; Bergstrom v. Ind. Comm., 286 Ill. 29, 121 N. E. 195; Schanning v. Standard Co., 203 Mich. 612, 169 N. W. 879; Poluskiewicz v. Philadelphia Co., 257 Pa. 305, 101

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Atl. 638; Davis v. Smith, 262 Pa. 432, 105 Atl. 559; Fitzgibbons Case, 230 Mass. 473, 119 N. E. 1020; Ginsberg v. Burroughs, 204 Mich. 130, 170 N. W. 15.

The Massachusetts court seems to claim a larger power of review over decrees of the Industrial Accident Commission.

"It [the court] has jurisdiction over the case in the same way and to the same extent that it has for example in a suit in equity where the facts have been found by a master." Brown's Case, 228 Mass. 38, 116 N. E. 899.

But no law makes a master's finding final in the absence of fraud. While the report of a master "has every reasonable presumption in its favor" (Dean v. Emerson, 102 Mass. 482), it may be set aside if the court, upon weighing the evidence, deems such report clearly wrong. But this is to finally judge the facts. As a court of chancery the court has and exercises this power. Under the Workmen's Compensation Act it has, in the absence of fraud, no jurisdiction to decide questions of fact.

Other cases hold that:

"The finding [of the Industrial Accident Commission] stands upon the same footing as the finding of a judge or a verdict of a jury." Pigeon's Case, 216 Mass. 52, 102 N. E. 933, Ann. Cas. 1915A, 737; Diaz's Case, 217 Mass. 36, 104 N. E. 384; McCarthy's Case, 231 Mass. 259, 120 N. E. 852; Simmon's Case, 117 Me. 175, 103 Atl. 68.

This statement is not entirely accurate. A jury-verdict may be set aside, if the court finds it influenced by sympathy, passion. or prejudice, or manifestly against the weight of evidence. But under the explicit language of the Workmen's Compensation Act fraud, and fraud only, can be invoked to defeat a commission's finding of facts.

[12] The decree of the commissioner is indeed analogous to a finding of a judge who by consent determines facts, or (as indeed it is) an award by a referee agreed upon by the parties. That such a finding or award cannot be impeached by showing errors of judgment, however gross, as to the weight and credibility of testimony, is settled by so many authorities that citation is unnecessary.

In any event the weight and credibility of testimony must be finally determined by finite and fallible men. By assenting to the act, the parties under sanction of statute have selected for this purpose the Industrial Accident Commission. With this selection we have no right to interfere.

In cases wherein the evidence is circumstantial, and not direct, the line between inference and conjecture is sometimes obscure. The Massachusetts court has said:

"The dependent must go further than simply to show a state of facts which is equally consistent with no right to compensation as it is with such right." Sponatski's Case, 220 Mass. 528, 108 N. E. 467, L. R. A. 1916A, 333; Sanderson's Case, 224 Mass. 562, 113 N. E. 355.

[13] If, however, a state of facts is shown more consistent with the commissioner's finding than with any other theory, and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained. Papinaw v. Railway Co., 189 Mich. 441, 155 N. W. 545; In re Myers (Ind. App.). 116 N. E. 314.

[14] *Evidence of Accident.*—The defendants deny that the illness and death of Mailman was due to an injury, accidental or otherwise. They argue that when he began work on the evening of April 18th he was "coming down" with pneumonia. This is disputed. If true, it is not decisive. Evidence that an existing disorder reaches the point of disablement during employment, of course, does not prove accidental or other injury arising out of such employment. It is sufficient however (assuming other elements proved), if by weakening resistance or otherwise an accident so influences the progress of an existing disease as to cause death or disablement. Voorhees v. Smith, 86 N. J. Law, 500, 92 Atl. 280; Trodden v. McLennard, 4 B. W. C. C. 190; Doughten v. Hickman, 6 B. W. C. C. 77; Puritan v. Wolfe (Ind. App.) 120 N. E. 417.

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In a recent Michigan case the point is clearly stated:

"The testimony cannot be harmonized. We find ground for saying that the board had before it some evidence tending to prove that the fall which Mr. Gaffney had set up a train of physical disturbances, affecting an existing pathological condition in such a way as to cause his death. We therefore decline to set aside the award." Gaffney v. Goodwillie, 203 Mich. 591, 169 N. W. 849.

In the case before us, was the disease caused by, or was its fatal result due to trauma or injury? If this court had been the trier of facts, it might have decided this issue in favor of the defendant. But the commissioner found the issue for the plaintiff. Is this finding sustained by any competent testimony?

[15] There is some evidence that upon the body of the deceased a mark, or marks, were observed which turned back when blood poisoning set in. There is some medical testimony to the effect that the symptoms were more consistent with traumatic pneumonia than with illness otherwise caused. The spontaneous exclamation of the suffering man, "I got hurt," clearly admissible for this purpose, shows that what he sensed and felt was the shock of a hurt rather than the prostration of illness. In view of these circumstances, it cannot be reasonably said that there was no evidence that the illness of the deceased was traumatic.

There being no evidence, suggestion, or presumption that any injury sustained by the deceased was occasioned by his willful intention, or that it resulted from his intoxication while on duty, we think it is an almost necessary inference that, if he were injured, the injury was accidental.

[16] *Evidence That the Injury Arose Out of and in the Course of the Employment.*—Both of these elements must appear. The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed, and because employed by the defendant. There is evidence that Mailman on the night of the 18th was in good health. He was left performing his duties at the foundry "laughing and joshing." The following morning he was found, still at his post of duty, stricken and helpless. The deceased might have left the foundry in the night in pursuit of his own affairs, received an injury, and found his way back. He might have been injured in the foundry while doing something for his own personal pleasure, entirely independent of his employment. These unsupported hypotheses are so improbable as to be almost negligible. From all the circumstances, the commissioner drew the inference that Mailman's injury was received while employed at the defendant's foundry and arose out of such employment. This inference is neither unnatural nor irrational.

The authorities with substantial uniformity support this conclusion.

"If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think it falls on the employer, if he disputes the claim, to prove that the contrary was the case." Papinaw. v. Grand Trunk, etc., Co., 189 Mich. 448, 155 N. W. 547; Wishcaless v. Hammond, 201 Mich. 192, 166 N. W. 995.

"If there are facts and circumstances proven in the case from which the essential ultimate facts may reasonably be inferred, and the court or board whose duty it is to pass upon such facts has drawn therefrom the essential ultimate facts, this court will not disturb such finding, though other and different facts might be inferred therefrom by other minds equally as fair and reasonable." Bimel, etc., Co. v. Loper (Ind. App.) 117 N. E. 527.

"When the employee dies at his post of duty, a presumption may reasonably be entertained that he was then performing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred." Hills v. Blair, 182 Mich. 22, 28, 148 N. W. 243, 246.

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In the following cases the cause and character of the accident were shown solely or chiefly by circumstances below outlined. In each case the trier of facts awarded compensation to the dependent. In every case the finding was upheld:

A butcher's canvasser was in the habit of riding a bicycle on his rounds, and came back one day lame, covered with mud, and in pain. Haward v. Rowsell & Matthews, 7 Butterworth's Compensation Cases, 552 (English cases).

The employment of a collier was such that scratches were often caused on his arms or legs. He went to work perfectly sound in the morning, and later required help with his work (which was unusual), limped, and rubbed his knee, and was later found to have an abraded knee, and eventually died from septic poisoning. Hayward v. Westleigh Colliery Company, 8 B. W. C. C. 278.

A mason's laborer sustained an abrasion on the thumb of the hand which held the chisel. Two weeks later an abscess appeared in the arm pit and the man died. The circumstances were consistent with the entry of a microbe into his thumb, causing blood poisoning, on the day of the accident. Fleet v. Johnson & Sons, 6 B. W. C. C. 60.

A repairer, beginning work at a colliery in the evening uninjured, went home next morning with one of his fingers crushed, and finally died of blood poisoning. Mitchell v. Glamorgan Coal Co., 9 .B W. C. C. 16.

A man in good health, working in the hold of a ship, came up out of the hold in great pain, and went home, where it was found he had marks on his ribs. He died of pneumonia. Lovelady v. Berrie, 2 B. W. C. C. 62.

Deceased, an elevator man in a factory, disappeared. His body was found in elevator pit. Wishcaless v. Hammond, 201 Mich. 192, 166 N. W. 993.

Geo. C. Von Ette was a compositor. We went out on a roof adjoining the composing room. Workmen were accustomed to go upon this roof for fresh air, though there was an obsolete office rule against it. In some unexplained way he fell from the roof and was killed. Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641.

Deceased was section foreman. He went in the evening to mail his report. Some time afterward his mangled body was found on the railroad track, which he had to pass over on his return. Papinaw v. Grand Trunk Railway Co., 189 Mich. 441, 155 N. W. 545.

Decedent was employed in an automobile factory. Shortly before quitting time he came to the foreman and exhibited his left thumb, which had been injured. The foreman sent him to the company's doctor. His thumb having been bandaged, he went home. Blood poisoning followed, and he died. No testimony of the doctor appears. Kinney v. Cadillac Motor Car Co., 199 Mich. 435, 165 N. W. 651.

Deceased was a locomotive fireman. About 1 o'clock he went to a roundhouse where his engine was. About 2 o'clock his dead body was found on the cement floor of the roundhouse beside the engine. The physician found that he died from concussion of the brain. Meyers v. Michigan Central Railroad Co., 199 Mich. 134, 165 N. W. 703.

The decedent was night watchman in a warehouse on a water front. He began his duties at 10 o'clock at night on November 12, 1914. In the morning he had disappeared, and has never been seen since. There were indications of a struggle in the warehouse. Blood and the decedent's torn cap were found. There were marks where some heavy body had been dragged to the water. Western, etc., Co. v. Pillsbury, 173 Cal. 135, 159 Pac. 423.

Deceased was night watchman in a brewery. His duties consisted mainly in cleaning up after the day force had left and after midnight to turn on steam. Between 8 and 9 o'clock at night he was discovered unconscious in the brewery basement. He died the following morning. There was an abrasion on the back of his head and one shoulder was

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bruised. The finger nails of one of his hands were turned back. The evidence showed an opening in the floor through which he might have fallen. Heileman Brewing Co. v. Shaw, 161 Wis. 443, 154 N. W. 631.

The learned counsel for the defendants in their able and exhaustive brief cite several Massachusetts cases. Upon examination some of these authorities will be found in harmony with our conclusion, and others clearly distinguishable on facts. Even Sanderson's Case, 224 Mass. 562, 113 N. E. 355, upon which the defendants confidently rely, is not in conflict. In that case a driver fell from his wagon and died from cerebral hemorrhage. Whether the fall was the cause or the consequence of the hemorrage was the dispute. The court held that the two hypotheses were equally consistent with the circumstances proved, and that the selection of one supposition as the basis for a decree was mere conjecture. But in the case at bar we have held that a state of facts is shown more consistent with the commissioner's finding than with any other theory, and that the finding is supported, not indeed by the only possible, or even reasonable, inference, but by inferences which are not unnatural and not irrational.

Appeal denied. Decree affirmed.

SUPREME JUDICIAL COURT OF MAINE

WESTMAN'S CASE.*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF.

The burden rests on claimant to prove the facts necessary to establish a right to compensation under the Workmen's Compensation Act including the fact that the injury arose out of, and in the course of, employment, and evidence, though slender, that nevertheless will satisfy a reasonable man, is sufficient.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL—REVIEW OF FINDING.

To make successful challenge on appeal of finding of industrial commissioner on question whether injury arose out of, and in the course of, employment, there must be a favorable answer to query, as a question of law only, whether there was any evidence before the commissioner on which his decision may stand so firmly as to make it final under Workmen's Compensation Act, § 34.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF.

To insure recovery of compensation under the Workmen's Compensation Act by the deceased employee's widow, the burden rests upon her to establish that the employee's death was caused, first, by accident; second, that the accident arose out of the employment; and, third, that it arose in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

*Decision rendered, April 30, 1919. 106 Atl. Rep. 532.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROOF OF ACCIDENTAL DEATH.

To prove an accidental death within the Workmen's Compensation Act, it is not necessary to negative every other possibility of death except that by accidental means, and the proof need not necessarily be direct and positive, but may be by circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEATH AS ACCIDENTAL OR SUICIDAL—PRESUMPTIONS.

In determining whether a death was suicidal or accidental within the Workmen's Compensation Act, certain legal presumptions may properly be considered, and the amount of evidence, circumstantial as well as direct, with the proper presumptions, are all to be taken into consideration when investigating the question.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY AS ACCIDENT—QUESTION OF LAW AND FACT.

Whether an injury is an accident within the Workmen's Compensation Act is a mixed question of law and fact, which becomes a question of law when the facts are ascertained or determined.

(For other cases, see Master and Servant, Dec. Dig. § 409½, New Vol. 7A Key-No. Series.)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL DEATH—SUFFICIENCY OF EVIDENCE.

In proceedings under Workmen's Compensation Act for death of the cook of a tugboat when he fell overboard from a wharf to which his boat was moored, evidence *held* to sustain the finding of the industrial accident commissioner that the death was accidental.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"COURSE OF EMPLOYMENT."

Cook employed on tugboat and drowned when he fell overboard from a wharf to which his boat was moored, he having gone on shore to purchase supplies, a part of his duty, and returning with some of them in his possession, *held* injured "in the course of" his employment, within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEATH "ARISING OUT OF EMPLOYMENT."

Where the cook of a tugboat, moored to a wharf, went on shore to purchase supplies, part of his duty, and, when returning, fell from the wharf and was drowned, the death "arose out of" the employment, within the Workmen's Compensation Act, to justify award to his widow.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from Supreme Judicial Court, Cumberland County, at Law.

Proceeding for compensation under the Workmen's Compensation Act for death of Fred G. Westman, the employee, by Mabel C. Westman, his widow, against a towboat company and its insurer. Compensation

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was awarded, the award affirmed by the justice of the Supreme Court, and the employer and insurer appeal. Appeal dismissed.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, and Deasy, JJ.

Frederick J. Laughlin, of Portland, for applicant.
H. S. Avery, of Boston, Mass., for defendant.
Carroll B. Skillin and Edward H. Wilson, both of Portland, for London Guarantee & Accident Co., Limited.

PHILBROOK, J. This is a proceeding instituted by the dependent widow of Fred G. Westman to recover compensation under the terms and conditions of the statute commonly known as the Workmen's Compensation Act.

At the time of his fatal accident the deceased was employed by the defendant towboat company as a cook on its towboat Portland. By the terms of his employment he performed all the duties of cook on the boat, had full authority to buy, and was charged with the duty of buying, all supplies necessary to that work, and, when required, assisted around the deck. The accident occurred at about noon, on the 16th day of February, 1918, when the Portland was lying in a dock. The boat was moored to a coal lighter, which, in turn, was moored to the wharf. Between these two crafts and the head of the dock was lying another lighter, which was also moored to the dock. This lighter was in charge of A. P. Bennett, a witness in the case. On the outside of the second lighter was moored another towboat, and outside the latter was moored still another towboat. The distance from the edge of the wharf to the surface of the water was estimated to be nine or ten feet. On the fatal day, having served dinner to the crew and partaken of his own midday meal, Westman went to a neighboring store to buy supplies. Taking two or three purchases under his arm, he started to return to the boat, being observed to pass along the dock toward his destination, and thus, for the last time, was seen alive. Mr. Bennett, who was on board his lighter, says he heard a thump thereon, followed by a splash. Upon making investigation he saw the unconscious body of Westman in the water between the ends of the two lighters, called for assistance, and the body was taken to the dock. Resuscitation was attempted, but without avail. Westman was dead.

Proper steps were taken to present the claim of the plaintiff to the chairman of the Industrial Accident Commission. He sustained the claim, and ordered payment of the compensation provided by statute. This finding and order, following the practice provided in such cases, was presented to a justice of the Supreme Court, who rendered a decree in accordance therewith, and from that decree the defendants bring the case before us by appeal.

Defendant's Contentions.

(1) That the deceased employee was a seaman on a vessel engaged in interstate and foreign commerce, and therefore his dependent widow is not entitled to the benefits of the Workmen's Compensation Act.

(2) That the burden of proof is upon the petitioner to show by the preponderance of the evidence that the injury arose out of and in the course of the employment, and that, failing to establish the burden of proof, the petitioner cannot recover.

(3) That there is no evidence on which the commissioner was warranted in finding as a fact that the injury arose out of, and in the course of, the employment; that such a finding of fact on the evidence presented could be mere conjecture only, and that the evidence most favorable to

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the plaintiff was as consistent with the injury arising in such a manner as not to be compensatable as to be in such a manner as to be compensatable.

First Contention.

[1] As the basis of their first contention the defendants call attention to R. S. c. 50, § 1, par. 2, which provides that "masters of and seamen on vessels engaged in interstate or foreign commerce" are excluded from the classes of employees who are entitled to the benefits arising under the Compensation Act. The reasons for this statutory exclusion, evidently growing out of the maritime law and the jurisdiction of admiralty courts over maritime torts, are not in issue, so that a discussion of this most interesting subject would be without justification of merit at this time. Nor is the jurisdiction of the state tribunal over the instant case denied, a jurisdiction which the Judicial Code (Act Cong. March 3, 1911, c. 231, 36 Stat. 1160) § 256, as amended by Act of Congress October 6, 1917, c. 97, § 2, 40 Stat. 395 (U. S. Comp. St. 1918, § 1233), confers in behalf of those who claim "the rights and remedies under the workmen's compensation law of any state." But the defendants read the excluding clause literally, and thereunder claim immunity from liability. Therefore the first question presented to us is whether at the time of his fatal accident the deceased was a seaman on a vessel engaged in interstate or foreign commerce, under the terms of the Compensation Act, when properly construed.

The record discloses that the towboat Portland, on which Westman was employed as we have stated, was duly registered at the proper United States customs house; that the range of her license was from Eastport to Cape Cod; that her towing duties consisted in going wherever her orders called her to go, within the range of her license; that the greater part of her work was in Portland harbor; that at the time of the accident she was not engaged on any job, but was lying at the dock.

Defendants contend that, under these conditions of registry, license, and breadth of duties, this towboat is to be regarded in general terms as a vessel engaged in interstate and foreign commerce. They even claim that her principal business was aiding and facilitating such commerce, although we cannot concede that the record substantiates this claim. They urge that the true question for determination is whether this vessel was one generally engaged in interstate and foreign commerce, and not whether she was so engaged at the time of the accident. They say that, without the more permanent classification as to the character of the vessel's employment, there would arise frequent confusion and uncertainty as to the rule applicable under the Compensation Act, because the employee might at one moment be engaged in interstate and foreign commerce and otherwise at another moment. According to the great weight of authority, however, the test must be applied to the conditions actually existing at the time when the accident occurred.

In N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, Mr. Justice Lamar said:

"Owing to the fact that during the same day railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions, where it is difficult to define the line which divides the state from interstate business. * * * Each case must be decided in the light of the particular facts with a view of determining whether at the time of the injury the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

This opinion, it should be observed, was given in an action brought under the Federal Employers' Liability Act, and not under a Workmen's Compensation Act; but we hold that the same rule should apply to actions brought under either act. Other cases in which the same rule is applied

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are Shanks v. Delaware, Lackawanna & Western Railroad, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Erie Railroad Co. v. Jacobus, 221 Fed. 335, 137 C. C. A. 151; Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, and cases cited in Ann. Cas. 1914C, 163.

In Morrison v. Commercial Towboat Co., 227 Mass. 237, 116 N. E. 499, a case arising under the Massachusetts Workmen's Compensation Act, the court was considering the claim of a master of a towboat, and discussed the same excluding clause as that now before us. In that case sometimes the boat was engaged in towing barges from Boston docks to a point down the harbor where ocean-going tugs took them and towed them to ports in other states. Sometimes the boat was employed in work wholly within the harbor, and in no way connected with or similar to that just above described. When engaged in moving barges as the initial part of their interstate voyage the court held that the exclusion of the statute applied, but further said:

"As the towboat on which the plaintiff was master plied only within the limits of Boston Harbor, it may be assumed that at times it was engaged in work that plainly was of intrastate character. The decisive question in this case is, was the towboat Hersey engaged in interstate commerce, within the meaning of the statute, at the time when the plaintiff was injured?"

So it will be seen, in the case just referred to, that the decision turned upon the nature of the work in which the towboat was engaged at the very time when the employee was injured, and not upon the general character of the work done by the towboat, or whether a greater or smaller part of that work was interstate or intrastate.

Under the facts of the case at bar, hereinbefore briefly stated, and more fully set forth in the record, we have no hesitation in declaring that Westman, at the time of his fatal accident, was not a seaman on a vessel engaged in interstate or foreign commerce, and it must follow that the first contention of the defendant fails.

Second Contention.

[2] It is undoubtedly true, and has been frequently so held, that the burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under a Workmen's Compensation Act. Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Sanderson's Case, 224 Mass. 558, 113 N. E. 355. By the same authorities and many others, the claimant must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. Surmise, conjecture, guess or speculation are not sufficient to sustain the burden and justify a finding in behalf of the claimant. But, on the other hand, "if the evidence upon the questions involved is slender, but is sufficient to satisfy a reasonable man, a case has been made out in favor of the claimant." Von Ette's Case, supra. "The Industrial Accident Board in the determination of questions of fact is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw." Sanderson's Case, supra. "If the evidence, though slight, is yet sufficient to make a reasonable man conclude in his [the claimant's] favor on the vital points, then his case is proved." Sponatski's Case, supra. These rules undoubtedly apply to the burden resting upon the claimant to show that the injury which caused death arose out of and in the course of the employment of the deceased. They are in harmony with defendant's second contention, although, perhaps, the defendants would desire to limit the extent of these rules to some degree. The second contention is sound.

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Third Contention.

[3] The third contention directly challenges the findings of fact made by the commissioner upon the question whether the injury actually arose out of and in the course of the employment. Section 34 of the act now under consideration provides that in the absence of fraud the decision of the commissioner "upon all questions of fact shall be final." This provision has been recognized in the somewhat recent case, Hight v. York Mfg. Co., 116 Me. 81, 100 Atl. 9, L. R. A. 1917E, 277. The same section also provides for an appeal, by any party in interest, to the Supreme Judicial Court, where a justice thereof ministerially renders a decree in accordance with the findings of the commissioner. "Such decree," says the statute, "shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though rendered in a suit in equity duly heard and determined by said court, except there shall be no appeal therefrom upon questions of fact found by said commission or its chairman." If any party in interest desires to appeal from this ministerial decree, then the statute provides that "the proceedings shall be the same as in appeals in equity procedure, and the law court may, after consideration, reverse or modify any decree made by a justice, based upon an erroneous ruling or finding of law." It follows that, in order to make his challenge successful, the defendant must rely upon a favorable answer to the query, as a question of law only, whether or not there was any evidence before the commissioner upon which his decision may so firmly stand as to make it final.

[4] This naturally leads to the inquiry as to what must be proved and how the burden of proof must or may be satisfied. Under the terms of our statute and the rules of evidence above referred to, it must be conceded that to insure recovery of compensation the burden of proof rests upon the claimant to establish that Westman's death was caused (a) by accident; (b) that the accident arose out of the employment; (c) that the accident arose in the course of the employment. "Even though the injury arose out of and in the course of the employment, if it be not 'an accident,' within the purview of the act, there can be no recovery. Even if there be an accident which occurred 'in the course of' the employment, if it did not arise 'out of the employment' there can be no recovery; and, even though there be an accident which arose 'out of the employment,' if it did arise 'in the course of the employment' there can be no recovery." Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458.

[5, 6] As to sustaining the burden of proof, we have just seen, when discussing the second contention of the defendant, that even slender evidence may be sufficient if it would satisfy a reasonable man, and that reasonable inferences may be drawn from the evidence. But it is also true that in attempting to prove accidental death it is not necessary to negative every other possibility of death except that by accidental means. Rideout Co. v. Pillsbury, 173 Cal. 132, 159 Pac. 435. Nor must the proof be necessarily direct and positive; it may be by circumstances. Heileman Brewing Co. v. Shaw, 161 Wis. 443, 154 N. W. 631. Moreover, there are legal presumptions which may be properly considered. "In human experience it is the common desire and effort to preserve life rather than destroy it, and hence the law, where a person is found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence." Milwaukee Western Fuel Co. v. Industrial Commission of Wisconsin, 159 Wis. 635, 150 N. W. 998. Under this rule of presumption it was held in Steers v. Dunnewald, 85 N. J. Law, 449, 89 Atl. 1007, that the death under consideration must have arisen from either accident, suicide, or murder, and added, "Suicide and murder involve criminal acts, and crime is not to be presumed. The only other alternative is accident." In short, the amount of evidence, circumstantial as well as direct evidence, together with proper legal presumptions, are all to be taken into consideration

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when investigating the question whether any evidence was before the commissioner upon which he might properly find a verdict.

Accident.

Recurring to the three essentials which the claimant must prove, we first inquire, what is an "accident," as the term is used in the statute, and has this essential been proved.

[7] The Michigan Compenastion Act does not award compensation for all personal injuries suffered by an employee, but for accidental injuries only; and the court of that state, in Robbins v. Gas Engine Co., 191 Mich. 122, 157 N. W. 437, said that the words "accident" and "accidental" in their act were used in their popular and ordinary meaning, as happening by chance, unexpectedly taking place, not according to the usual course of things. The supreme federal tribunal in Mutual Accident Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, said that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means. The question whether or not an injury is an accident, within the purview of the act, is a mixed question of law and fact. When the facts are ascertained, are determined, it becomes a question of law. Bryant v. Fissell, supra; Roper v. Greenwood (1900) 83 L. T. 471; Fenton v. Thomley (1903) A. C. 443; 19 T. L. R. 684.

As our statute, like many others, provides compensation only when the injury arises from accident, has this essential been proved? Before answering this question let us cite one or two cases which seem pertinent.

In Milwaukee, etc., v. Industrial Commission, etc., supra, a workman, in going to a toilet room, walked along a narrow passageway between the buildings and the river. The toilet room and the walk were used by the employees of the company. Another workman, hearing the splash, looked out of a window, and saw his fellow workman in the water, but making no struggle to save himself. Assistance was rendered as soon as possible, but life could not be restored. Held, that all the circumstances warranted a finding that death resulted from accident.

In Steers v. Dunnewald, supra, a workman, employed in building a bridge over a river near its outlet, was last seen alive at his home, some miles from his work, and his dead body was later found in the bay, there being no evidence as to how he met his death. Under the presumptions regarding accident, suicide and murder, the court held that a finding of death by accident should be sustained.

Where a deck hand on a steamboat so loaded as to make it convenient to go forward by walking along the narrow side rail, after being seen to go forward, was next seen in the water, drowning, there being no evidence of, or reason for, suicide, was held to have met death by accident. Olsen v. Hale, 2 Cal. I. A. C. Dec. 581.

In an English case a sailor who went on deck at night to get fresh air was found dead in the water on the following morning. Death held to be accidental. Marshall v. Owners of Ship Wild Rose, 3 B. W. C. C. 514.

[8] In the case at bar there is no circumstance or evidence which even hints at suicide or murder. There is no evidence tending to show that Westman was other than a well-able-bodied man, with pleasant domestic environment. No financial or other trouble bore him down. To such men life is sweet, and its termination would not be naturally sought by design. By the testimony, by proper inference, and by legal presumptions we think the finding of the commissioner upon the question of accidental death was correct.

Injury Arising in the Course of Employment.

[9] The authorities seem well agreed that the expressions "arising out of" and "in the course of" in compensation acts are not synonymous.

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The words "in the course of" refer to time, place, and circumstances under which the accident takes place. Bryant v. Fissell, supra; Fitzgerald v. Clarke & Son, [1908] 2 K. B. 796. In the former case the court said:

"An accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

In Larke v. John Hancock, etc., Ins. Co., 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584, the court said:

"An injury to an employee is said to arise in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental to it."

The Massachusetts court in McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, tersely said:

"An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform."

Westman, at the time of his death, according to the record, was doing, at a time, at a place and of a nature, the duties which his employment reasonably called him to perform. His injuries were received in the course of his employment.

Injury Arising Out of Employment.

[10] This branch of the law has given rise to much discussion in the English courts as well as in the courts of this country. It is practically impossible, in every case, to harmonize the result with that of every other case, or to clearly understand the logic which leaves one accident within the legal zone and the other without it. Upon fundamentals the courts are substantially in harmony. The great weight of authority sustains the view that these words "arising out of" mean that there must be some casual connection between the conditions under which the employee worked and the injury which he received. McNicol's case, supra; Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Federal Rubber Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968; Fitzgerald v. Clarke & Son, supra; Mitchinson v. Day Bros., [1913] 6 B. W. C. C. 191.

"Under this test," says the court in McNicol's Case, supra, "if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant."

In Coronado v. Pillsbury, supra, the court said:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."

In Mitchinson v. Day Bros., supra, a clear statement is made in this language:

"To satisfy the words of the act the occurrence must be one in which there is personal injury by something arising in a manner unexpected

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and unforeseen, from a risk reasonably incidental to the employment. Nothing can come 'out of the employment' which has not, in some reasonable sense, its origin, its source, its causa causans, in the employment."

It might with safety be said that, in order for the accident to arise out of the employment the employment must have been the proximate cause of the accident.

Did Westman's fatal accident arise out of the employment? Again, before answering this question we cite a few pertinent cases.

A watchman on construction work, while making his rounds, fell from a board scaffold into the cellar below. Held, that the accident arose out of the employment. Sorge v. Aldebaran Co., 3 N. Y. St. Dep. Rep. 390.

A cook returning from a porch to the kitchen, there to resume his duties, fell down the cellar stairs. Held, that the accident arose out of the employment. Espy v. Crossman, 2 Cal. I. A. C. Dec. 326.

A night watchman, while making his rounds, fell through an opening in the floor and was thereby killed. Held, that the accident arose out of the employment. Carter v. Hume-Bennett Lumber Co., 2 Cal. I. A. C. Dec. 52.

A shipmaster, who went ashore to pay a seaman his wages, on his return fell from the dock and was drowned. Held, that the accident arose out of the employment. Jones v. Owners of Ship Alice and Eliza, [1910] 3 B. W. C. C. 495.

All these cases seem pertinent to the one at bar.

Westman's accident was a natural incident of his work, the risk was one occasioned by the nature of his employment, the injury was traceable to the nature of his work and to the risks which his employer's work exposed him. We feel assured that the fatality arose out of the employment.

The mandate will accordingly be—

Appeal dismissed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

HAMPDEN.

AMODIO'S CASE.

IN RE JOHN S. LANE & SON.

IN RE ROYAL INDEMNITY CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —REVIEW OF FINDING OF ACCIDENT BOARD.

On a matter of fact the conclusion of the Industrial Accident Board is final, and cannot be reversed, unless quite unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Hampden County.

Proceeding for compensation for injuries, under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), by Salvatore Amodio, opposed by John S. Lane & Son, the employer, and

* Decision rendered, May 21, 1919. 123 N. E. Rep. 335.

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the Royal Indemnity Company, the insurer. Additional compensation was denied, the denial affirmed by the superior court, and from its decree, the employee appeals. Affirmed.

Silvio Martinelli, of Springfield, for appellant.
Thomas H. Calhoun and Edward J. Sullivan, both of Boston, for appellee insurer.

PER CURIAM. This case comes before us by appeal from a decree of the superior court affirming a decision of the Industrial Accident Board, which in turn adopted and confirmed the finding of the single member. The record presents no question of law whatever. Whether the employee was entitled to a finding in his favor was wholly a matter of fact. On a matter of fact the conclusion of the Industrial Accident Board is final and cannot be reversed unless quite unsupported by evidence. There is no ground for disturbing their finding in the case at bar, which is covered in every particular by the Case of Pass, 232 Mass. —, 122 N. E. 642, and decisions there collected.
Decree affirmed.

SUPREME COURT OF MICHIGAN.

DOHERTY
v.
GROSSE ISLE TP. (No. 43.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—EVIDENCE.

In proceedings for compensation for death of plaintiff's husband employed as a gatekeeper on a highway of defendant township, *held*, under the evidence, that deceased was injured while employed by defendant and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—EVIDENCE.

In proceedings for compensation for death of plaintiff's husband employed as a gatekeeper on a highway, *held*, that court on appeal could not say that finding of industrial board that accident arose out of deceased's employment was entirely without competent evidential support.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—MATTERS NOT PASSED ON BY ACCIDENT BOARD—REVIEW.

Where claim that decedent was a casual employee was concededly not properly raised before accident board nor passed upon by it, the question of casual employment is not properly before the Supreme Court for review.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

* Decision rendered, May 29, 1919. 172 N. W. Rep. 596.

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5. MASTER AND SERVANT—CASUAL EMPLOYMENT—EVIDENCE.

In proceedings for compensation for death of plaintiff's husband employed as a gatekeeper on a highway of defendant township, *held*, it was not shown that deceased was a casual employee.

(For other cases, see Master and Servant, Dec. Dig. 405[2].)

6. MASTER AND SERVANT—CASUAL EMPLOYMENT—EVIDENCE.

That deceased was injured on the first day of his employment would afford no test that his employment was casual.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE OF DEPENDENCY—SUFFICIENCY.

Evidence *held* to support finding that claimant was living with deceased as his wife at the time of his death and was conclusively dependent upon him for support within Workmen's Compensation Law, pt. 2, § 6(a).

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

8. MASTER AND SERVANT—PROXIMATE CAUSE OF DEATH—EVIDENCE.

In proceedings for compensation for death of plaintiff's husband who suffered an accidental injury to his foot, evidence *held* to sustain finding that death resulted from the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Law by Bridget Doherty for compensation for the death of her husband, John Doherty, opposed by the Township of Grosse Isle. Decision in favor of claimant, and defendant brings certiorari. Affirmed.

Argued before Bird, C J., and Ostrander, Moore, Steele, Brooke, Fellows, Stone, and Kuhn, JJ.

Orla B. Taylor, of Detroit, for petitioner.

Frederick T. Witmire, of Detroit (Joseph A. Moynihan, of Detroit, of counsel), for claimant.

STEELE, J. The State Industrial Accident Board found and held in this case that plaintiff's husband, John Doherty, sustained an accidental injury while in defendant's employ, arising out of and in the course of his employment, which was the "proximate" cause of his death; that plaintiff was living with him as his wife at the time of his injury and under the Workmen's Compensation Law (Pub. Acts 1912 [Ex. Sess.] No. 10) conclusively dependent upon him for support; that, as he was injured before Act 41, Pub. Acts 1917, went into effect, compensation should be computed according to the "so-called 300-day rule," and awarded plaintiff $9.06 per week for 300 weeks with deceased's reasonable expense of hospital and medical attendance from the time of his injury until his death.

Defendant had already paid the hospital and medical expenses incurred, but denied all legal liability under the statute, and has appealed the proceeding to this court for review on certiorari alleging in its application therefor ten claimed grounds for reversal, five of which are argued and urged in counsel's brief as follows:

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"(1) There is no evidence that the injury arose out of and in the course of the employment.

"(2) Error was committed in allowing the introduction of hearsay testimony, upon which the finding of the board was necessarily based.

"(3) Doherty was merely a 'casual' employee.

"(4) There was no legal or competent evidence Bridget Doherty was living with John Doherty at the time of his death or that she was dependent on him for support.

"(5) There is no evidence sustaining the finding that death resulted from the injury."

These contentions are all, in substance, that the facts as found by the board have no evidential support. The proposition that under the wording of the statute this court cannot weigh the evidence or assume to determine the facts, nor review the board's findings as to them farther than to ascertain whether there is any competent evidence direct or circumstantial to support them, whether positive or negative, has been heretofore fully discussed in its various aspects and reiterated in recent decisions. The only debatable questions along that line are in the field of inference, or permissible deductions of the existence of essential facts not sustained by direct testimony, but reasonably inferable from other facts of which there is direct proof.

Doherty was married to plaintiff in 1873, at Wyandotte, Mich., by a Catholic priest, and, although they have since lived apart at intervals, neither ever applied for or contemplated a divorce. When he died at the Elbert Memorial Hospital at Wyandotte, on May 31, 1917, they had four living children of mature years, the youngest born in 1883, all married and taking care of themselves in homes of their own. He was taken to the hospital in an automobile on May 19, 1917, directly from where he was working on defendant's highway, for care and treatment of a recently crushed foot and remained there under daily medical attendance until his death. H. L. Wilton, supervisor of defendant township and its agent for transaction of all legal business (section 2118, Comp. Laws 1915), in his report of the case to the Industrial Accident Board, dated February 12, 1918, made out on its "Form No. 6," gave deceased's age as "about 80 years," occupation, "watchman," branch of work, "good roads," cause and manner of accident, "motor-truck run over toe," nature and extent of injury, "abrasion on his toe, no bones broken." Plaintiff who had been married to deceased over 40 years and raised a family of four children by him, all born in Grosse Isle, testified that he was 68 years old when he died, that he used to be a heavy worker, could even in his older days do "a good, hard day's work," and at the time he was injured yet able to do the work at which he was employed.

It is not disputed that on the day and just before he was taken to the hospital Doherty suffered an accidental injury to his foot of a nature requiring medical attendance, while he was employed as a watchman, or gatekeeper, on a highway of the township described by its supervisor as the "east road near Trenton Crossroad, Grosse Isle," upon which defendant was then engaged in making improvements under the general superintendence of Robert Johnson, its highway commissioner, a long-time neighbor of Doherty on Grosse Isle who had lived near his place since 1898 and known him much longer, he guessed since 1870, had seen him "all over Grosse Isle, at different places," had previously employed him at various times both to work on the township highways and privately to work for him on his own place, having hired him to do some plowing on his farm the previous fall (1916) and to do a little work for him in January. He had as highway commissioner employed him to work on defendant's highway during 1916 at different times in each month from April to October inclusive. Doherty had injured his wrist during the winter, and in the spring of 1917 asked Johnson for a job on the highway at gatekeeping, as he could not do hard work

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Johnson had told him he would, when a gatekeeper was wanted, and notified him to report for that work on the morning of the day he was injured. Doherty did so and was directed to "take care of the upper gate," by a man named Lafayette, who stated he "was sort of what you call a sub-boss at the time," and doing other work, but who had been keeper at that gate the day before Doherty came on. He testified as to Doherty's duties there, in part:

"He had a gate to open there. He was supposed to open the gate for the truck to get in."

This referred to trucks hauling stone for the road which the township was engaged in resurfacing. The crushed stone for this was delivered at different points along the improvement as the work progressed by a Mr. Parker, who had a contract to haul it from the mainland and was using motortrucks for that purpose. While this work was in progress, the road was closed to public travel by obstructions placed across it at the extremities of the improvement, consisting of so-called "gates," described as a "sawhorse" made of "a piece of 2x8 with four legs spiked on it." This was opened to let the truck loaded with crushed stone pass, by swinging or carrying one end around. Johnson testified Doherty was "going to go on days," that it was necessary to keep a watchman or "gate tender" at those points "to keep people traveling from going over the new road" while it was under construction, that they were paid 35 cents per hour, and "we had to have them night and day." Asked as to the number of hours they worked, he replied:

"He worked 9 hours. Sometimes they put in eleven—those gatekeepers. * * * Well, they usually work 9½; they could stay 24 hours."

[1] Doherty was injured and sent to the hospital about noon. The foreman on the job was timekeeper, his time sheets being reported to and O. K.'d by Johnson, who turned them in to the township board after he had approved them. Doherty's name was on the pay roll, and the township records show him credited with 4½ hours' work that day. That he was injured while employed by defendant and in the course of his employment cannot be seriously questioned. The gate where he was stationed was at the extremity of the improvement and some distance from where the other employes were at work. Shortly before the noon hour, one of Parker's truck drivers brought him down in his truck to where the other men were at work and turned him over to them in an injured condition and unable to stand without assistance, telling them in Doherty's presence, after they had taken him out of the truck and had him on the ground, that he had driven over Doherty's foot while he was opening the gate. Lafayette then took charge of him and he was sent to the hospital. Johnson stopped at Doherty's home that evening and told plaintiff of her husband's injury and informed her that he had been taken to the hospital. He also reported the accident to the township clerk and stated he had sent Doherty to the hospital, and the clerk then so advised the supervisor. Johnson visited Doherty at the hospital a few days later and testified, "he said he thought that he felt pretty good," but, when asked what Doherty told him about the accident, replied:

"I don't know as I really talked to him about that. * * * I don't know as that came up."

[2, 3] The truck driver was not called as a witness at the hearing, but the chairman of the arbitration committee let the testimony as to his statement of how Doherty got hurt stand, against the objection that it was hearsay, on the erroneous theory that, "being an agent, he would have right to tell." It is contended for defendant the board's finding that the accident arose out of deceased's employment was necessarily based on this hearsay testimony. It was manifestly incompetent to prove the fact, and that the Industrial Accident Board on review so regarded it is somewhat indicated by the statement in its

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finding that "the manner of his injury was not shown as clearly as might be." The board did, however, find from the record as a whole that his injuries arose out of his employment.

These township officers had timely notice of the accident and ample opportunity to promptly investigate and ascertain the facts while Doherty was yet alive and the means of information freshly available. Wilton, the supervisor and agent of the township for transaction of its legal business, testified that he made an investigation of the case "by hearsay," talked at the time with Lafayette, Mr. Brow, the overseer of highways and foreman then in immediate charge of the work, and others; that he thought the belated report of the accident which he made after notice from the board, on Form 6, was filled out by "our attorney," and he signed it after satisfying himself "that these things were correct." Under previous rulings and reasons in preceding cases more or less analogous, which need not be repeated, we cannot say that the finding complained of was entirely without competent evidential support. Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 N. W. 67; Kinney v. Cadillac Motor Co., 199 Mich. 435, 165 N. W. 651; Ginsberg v. Adding Machine Co., 204 Mich. 130, 170 N. W. 15.

[4-6] The claim that Doherty was a casual employe was concededly not properly raised before the accident board nor passed upon by it. Defendant's written grounds of defense in denial of liability filed with the board under its rule 5, to which defendant is limited, contains no notice of such claim. In that particular the situation is substantially as in Roach v. Kelsey Wheel Co., 200 Mich. 299, 167 N. W. 33, where the subject is amply discussed. Contingent upon adverse rulings as to the grounds urged before the board, which are enumerated and passed upon in the opinion filed, the board there states, "No question is raised by respondent as to the amount of the award." The question of casual employment is not properly here for review, and if it were Doherty is not shown to come within that class. The fact that he was injured on the first day of his employment that spring affords no test. He was a common laborer on a road job which the township was engaged in, during which Johnson testified they had to have men employed "night and day" in the service he was performing. He had been employed by defendant at road work, more or less, every month during the previous summer The construction, repair, care, and maintenance of its highways was a regular duty of the township imposed by law. In that work it was in no better or different position than would have been a contractor to whom it had let a contract for the improvement.

[7] Defendant's claim that there was no competent evidence plaintiff was living with her husband at the time of his death, or that she was dependent upon him for support, ignores both the undisputed facts that she was at the time of his injury living with him in the family home on Grosse Isle which he had owned for many years and the conclusive presumption which obtains in such cases. This contention was initiated by defendant's supplemental report of the accident to the board on its "Form No. 7," in reply to the inquiry (No. 13) for names, ages, relationship, and address of dependents, made by the supervisor of the township as follows:

"John Doherty did not leave any dependents. He had not lived with his wife for a number of years. He lived alone in a shack on Grosse Isle and was an object of charity. Address of wife unknown."

The only proof we discover to sustain the claim he was ever an object of public charity is in defendant's books, which show the bills allowed by the township board for his hospital and medical expenses following the accident were eventually charged up after his death to the poor fund, because, as the township clerk testified, "we could not pay it out of any other fund." The proof is undisputed that he owned his home and at the time of his injury, which is the test, was living there with plaintiff, as husband and wife, in friendly relations, supplied

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with their own food and furniture; she caring for the home and cooking the meals which they ate together. The day before he was injured, May 18th, he gave her $10. On the day he was injured she had put up a lunch for him to take to his work. That evening she prepared their supper and had it ready awaiting his return when Johnson came to the doorstep and told her her husband was injured and had been taken to the hospital. She went to the hospital in Wyandotte the next day and stayed with her husband until he died. Her niece, with whom she had lived in Detroit during a portion of the winter because laid up with a sprained ankle, testified that on May 17th she went with plaintiff to her home on Grosse Isle to help her clean house; that Doherty was there and seemed pleased to see his wife; that she remained there settled in her own home when witness returned to Detroit the following day, and had continued to live on Grosse Isle since that time. Doherty had a brother and other relatives living on Grosse Isle, including a daughter, born on the island in 1876, who was married and yet living there in a home of her own at the time of his death. It was not shown that at the time of his injury and death his wife then living with him had any property or other means of support; but a long cross-examination of plaintiff, reviewing their married life of over 40 years, disclosed that he was a "drinking man," and the burden of the family had fallen heavily upon her; that while their married relations were otherwise pleasant and congenial and he "tackled anything wherever he could work," being known as a good worker all his lifetime, they had trouble "once in a while" on account of his drinking habits. Owing to that cause the family suffered from his improvidence, and she had worked out more or less during much of their married life, by the day or by the week; he at times being away for long periods and his whereabouts unknown to her. At times she would be at their home with him away, and at other times she would be away working and he at home. When he was injured, their children had long been grown and gone from home, caring for themselves. She testified that she lived with him at their home on the island in the summer of 1916, during which time he gave her money, and the following winter she was working in Detroit until she sprained her ankle, which laid her up at her sister's house for about three months, while he was at their home on the island and had injured his wrist; that she joined him in the spring as soon as she was able to do so, and they were living there together when the accident befell him. There was no evidence Doherty drank after her return, or had recently been drinking. But whatever his former delinquencies during the years of their married life, it being established that they were living together as husband and wife at the time of his injury and death, testimony as to whether he was supporting her or she was supporting him became immaterial. The act provides (section 6, pt. 2):

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employe:

"(a) A wife upon a husband with whom she lives at the time of his death;

"(b) A husband upon a wife with whom he lives at the time of her death."

[8] Upon the contention there was no evidence to sustain the finding that death resulted from the accident, it is undisputed that the injury proved in itself to be a serious matter and was so recognized at the time. Even the supervisor who reported it to the board as an "abrasion on his toe," and had arrived at the conclusion when examined that Doherty was not in the township's employ at the time, testified in explanation of their taking him to the hospital:

"We could not let that man lay on the roadside, whether he was an employe or not."

It was shown that Doherty was advanced in years and his recuperative powers impaired, that he was disabled by an injury to his wrist

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the previous winter, had arteriosclerosis and a weak heart, all resulting in a degree of debility. Dr. O'Brien, who was called to attend him, found his foot so badly crushed that the arteries were broken and the blood supply cut off from the tissues beyond, causing gangrene to develop, which, as the doctor testified, would in such a case be attended by a poisonous, or toxic, absorption into the system affecting the nervous organization and to a certain extent interfere with the secretions of the stomach. As the gangrene progressed, he grew weaker and became delirious, after which vomiting set in with an extension of the abdomen, and his bowels would not move. On the third day after reaching this condition, he died. Dr. O'Brien stated he expected to amputate the foot when the line of demarcation set in and made plain how far the dead tissue extended, but Doherty died before it occurred; that in his opinion the "immediate" cause of death was obstruction of the bowels, the gangrenous condition of his foot being a "contributing cause." No post mortem examination was had. Among the many questions asked of and answered by him are the following:

"Q. What was the cause of death? A. Well, the direct cause would be the obstruction. Q. What was the approximate cause or the contributing cause? A. The contributing cause would be the gangrenous condition of the foot. Q. Resulting from this injury? A. Of course, the gangrene did not result from that, because there were clots of blood formed, completely precluding the circulation of the arteries. * * * Q. And the severe shock, or the shock, combined with the arterial affliction in this man, and also his nervous condition, might easily have produced, or in a measure contributed to, his stomach trouble? A. Yes, it would be contributory. * * * Q. Could this gangrenous condition so upset the stomach that it would cause vomiting? A. Well, it might—yes, it could. * * * Q. What would you say as to the crushed foot as to whether it was—looked serious in itself if vou had not had other elements of old age and the heart, and the condition of the arteries existing? A. Well, if it was a young person it could be removed—the part that was gangrenous, possibly he would have got over it. In a young person, very often they do. * * * Q. You did not remove the foot in this case, or remove any of it? A. The line of demarcation had not set in. We had to wait for that. We didn't know how far to remove it; you can't tell until you see how far the dead tissue extends. Before the line of demarcation had set in the obstruction came on, and he died."

Without attempting to set out or review in full all the testimony which may be inferentially relevant, the conclusion is reached that the record as a whole gave room for the inference drawn by the board. Of this accident the following reflections in Gaffney v. Goodwillie, 203 Mich. 592, 169 N. W. 850, are well in point:

"We find ground for saying that the board had before it some evidence tending to prove that the fall which Mr. Gaffney had set up a train of physical disturbances, affecting an existing pathological condition in such way as to cause death. We therefore decline to set aside the award."

The order of the Industrial Accident Board will stand affirmed.

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SUPREME COURT OF MICHIGAN.

MOSHINSKI

v.

KAY SALT CO. ET AL. (No. 92.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AMOUNT OF COMPENSATION.

Where injured employe has so far recovered from injury as to be able to work for another employer, order of Industrial Board, refusing to reduce compensation to one-half of the difference between his average weekly wage at time of injury and the wage he is able to earn after injury, was unwarranted.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) by Roy Moshinski, for compensation for injuries, opposed by the Kay Salt Company, employer, and the Royal Indemnity Company, insurer. Application by employer and insurer to Industrial Accident Board, asking that compensation provided for by agreement be stopped upon the ground that employe's disability ceased, Order denying application, and employer and insurer bring certiorari. Order set aside, and case remanded with directions.

Argued before Bird, C. J., and Ostrander, Moore, Steele, Brooke, Fellows, Stone and Kuhn, JJ.

John B. Coughlin, of Detroit, for appellants.
Rubin, Fawcett & Dutcher, of Milwaukee, Wis., for appellee.

BROOKE, J. Certiorari to the industrial accident board. On September 27, 1916, applicant received a severe injury arising out of and in the course of his employment. A compensation agreement was at once entered into between the parties under which the indemnifying company paid to claimant the maximum compensation of $10 per week from the date of the injury to January 8, 1918. It later developed that claimant had so far recovered from his injury that on June 12, 1917, he obtained employment with the International Harvester Company of Milwaukee, Wis., where his average weekly wages amounted to $18.54. On February 20, 1918, an application was made to the board, praying that compensation be fixed as for partial disability at the rate of $3.23 per week, and that the excess already paid to claimant of $203.10 be credited to the employer upon payments made from and after January 8, 1918, as they became due. It appeared without dispute that the averments in the petition were true, and on the 24th day of May, 1918, the court made an order to the effect that the rate of compensation should be reduced to $3.23 from March 8, 1918, during the period of partial disability, and further:

"It is further ordered that compensation at the rate of $10 per week be paid applicant from the date of the last payment, January 8, 1918, to March 8, 1918. Should applicant again become totally disabled because of his injury, compensation shall be again paid at the rate of $10 per week. It is further ordered that respondents' prayer that certain

*Decision rendered, May 29, 1919. 172 N. W. Rep. 441.

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amounts already paid applicant be refunded to them is hereby denied."

No appeal was taken from this order. On the 15th day of August, 1918, a second application was made to the board by the insurance company, in which it is set up that after May 31, 1918, claimant was receiving an average weekly wage of $22.37; that therefore he was entitled but to the sum of $1.32 per week partial disability. It is further averred that on August 7, 1918, claimant quit his employment with the International Harvester Company, although he was offered $25 per week. Petitioner asked for an order that compensation be paid to claimant at the rate of $1.32 per week from May 31, 1918, to August 7, 1918, and that all further payments or compensation be stopped on the ground that disability has ceased, and the employe is able to earn the same wages he was earning at the time of the accident. Considerable testimony was taken on the second application and the board, on the 24th of December, 1918, made the following order:

"The board finds as a fact from the files and testimony in the case that said applicant should continue to receive compensation in accordance with the terms of the order entered by the board on May 24, 1918, viz., $3.23 weekly during the period he is partially incapacitated in the employment in which he was engaged at the time of the accident, and $10 weekly should he again become totally incapacitated in such employment; the board further finds that there is no evidence in the testimony submitted in support of said petition, medical or otherwise, which would tend to show that said applicant is able to fully resume his usual employment, and, there being no testimony whatever on this point, the petition must be denied.

"It is therefore ordered and adjudged that said petition should be, and the same is, hereby denied, and said applicant is entitled to receive and recover from said respondents compensation at the rate of $3.23 per week from the time payments were stopped, May 31, 1918, to the date of the hearing on said petition, November 20, 1918, in all the sum of $82.37, which amount shall be paid to applicant forthwith. It is further ordered that after November 20, 1918, said applicant is to continue to receive compensation in accordance with the terms of the order entered by the board on May 24, 1918, said order being in full force and effect at this time"—which is now reviewed in this court. The record shows conclusively that from May 31, 1918, to August 3, 1918, a period of nine weeks, claimant received an average of $22.31 per week. This, deducted from the sum of $25, which he was receiving when injured, leaves a balance of $2.69, 50 per cent. of which is $1.35. We can find no warrant in the record for the allowance of $3.23 during this period. On August 6th claimant quit working for the International Harvester Company, and started to work for the James J. Swartz Fur Company, where he earned but $12 per week. This employment continued from August 7th to September 24th, when he took employment with the Milwaukee Tanning & Clothing Company, where he was working at the time of the hearing. His wages in the latter employment, according to his own testimony, were $22.05 per week. Fifty per cent. of the difference between that amount and $25 is $1.48. We think the appellant is correct in its contention that the board had no warrant in fixing the compensation at $3.23 as for partial disability. It is asserted by appellant that the board erred in holding that there was no evidence that disability had ceased after August 7, 1918. This assertion is based upon the fact that officers of the International Harvester Company testified that at the time claimant left its employ he was able to continue doing the work he was then engaged in, and his continuance there would have resulted in his receiving from and after August 7th a sum in excess of $25 per week. On the other hand, claimant testified:

"I couldn't stand it any longer, and my arm bothered me so that I had to quit."

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The testimony of the two physicians appearing in the case upon the earlier application tends to show that claimant sustained a very severe and extensive burn, which involved his left arm and left side; that there is a large area of scar tissue, some of it very deep. At the time they testified they gave it as their opinion that claimant's left arm was reduced in efficiency about 30 per cent.

The refusal of the board to grant the order discontinuing all compensation after August 7th will not be disturbed. The order of the board as made is set aside, and the case remanded for further proceedings in accordance with the terms of the act.

SUPREME COURT OF MICHIGAN.

NAERT ET AL.

v.

WESTERN UNION TELEGRAPH CO. (No. 70.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —SETTLEMENT OF DEPENDENT MOTHER WITH NEGLIGENT THIRD PARTY.

The mother of a deceased servant, by accepting settlement as administratrix of her son's estate or as an individual for all claims against the company whose negligence caused his death, did not thereby release the son's employer, in whose employment he was killed; from liability under the Workmen's Compensation Act, in view of part 6, § 1; the employer being left free to proceed against the negligent company under part 3, section 15, as though no settlement had been made.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

Certiorari to the Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act by Romanie Naert and others for the death of Joseph Naert, opposed by the Western Union Telegraph Company, employer. Compensation was awarded by the Industrial Accident Board, and the employer brings certiorari. Award affirmed.

Joseph Naert, son of claimant Romanie Naert, and half brother of claimant Mary Naert, was killed on April 24, 1918. He was a telegraph messenger working for respondent at the time of his death. In delivering messages he used a motorcycle. On the day of his death he was riding at a high rate of speed in a westerly direction on Mack avenue. At Baldwin avenue a truck belonging to the Cottage Grove Cemetery Company was being driven north across Mack. The motorcycle struck the truck with such violence that Joseph Naert was instantly killed. It is conceded by respondent that the accident arose out of and in the course of the employment, and that the average weekly earnings of the boy were sufficient to warrant a maximum award of $10 per week for 300 weeks. The dependency of the mother and sister of the deceased lad likewise is conceded, or, if not conceded, is not seriously questioned. The sole controversy between the parties arises out of the following facts:

*Decision rendered May 29, 1919. 172 N. W. Rep. 606.

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The Cottage Grove Creamery Company at the time of the accident was carrying industrial insurance. On the day after the lad was killed a representative of the insurance company called upon Romanie Naert, mother of the deceased, and, it being ascertained that Mrs. Naert was without funds to defray the funeral expenses of her son, Mr. Frick, the manager of the Cottage Grove Creamery Company, volunteered to "see to it that the funeral was paid for either by them or the insurance company." The negotiations between Mrs. Naert and the Cottage Grove Creamery Company and the insurance company carrying the risk seem to have been carried on by one Gaston Verdon, a friend of the Naerts. Within a day or two the lad was buried, and on April 30th, the arrangements having been completed, an application was made by Mrs. Naert to the probate court for her appointment as administratrix of the estate of her deceased son. She on the same day was appointed such administratrix, and likewise upon the same day filed a petition for leave to accept the sum of $176 from the Cottage Grove Creamery Company for a release of said company "on account of all liability on its part for damages to said estate on account of said accident." An order having been made by the probate judge, said sum of $176 was paid by the creamery company or the insurance company in the form of checks to the undertaker, the florist, and the priest who had rendered services in connection with the funeral. A further sum of $24 was paid by the creamery company directly to the mother in consideration of a release from her to it "of and from all claims, demands, damages, actions and causes of action, including all claims on account of loss of service, now existing or hereafter accruing on account of injuries accidentally sustained by Joseph Naert and death resulting therefrom on or about the 24th day of April." Romanie Naert is a Belgian, unacquainted with the English language. She testified:

"There was a man came there and asked if I straightened up the matter for the funeral, and for the motorcycle; he would give me that. If I did not take that, that I would have nothing. * * * A. They told me it was for the accident of the boy, to pay his funeral expenses. Q. Did they say anything further, if you did not sign for it? A. They said that he would give me that money; that they would give me that money for funeral expenses. He offered me $200 for the expenses, and the leavings was for me. If I would not take that, I would have nothing. That is what he said. Q. That is all. You had no lawyer representing you, did you? A. No."

All the court proceedings were carried out and the money was paid on the same day, April 30th, which was the sixth day after the death of Joseph Naert. Later, on the 11th day of September, 1918, Romanie Naert applied to the Industrial Accident Board for compensation under the statute. The award on arbitration provided for $10 per week for 300 weeks. This was affirmed by the full board in all things, except that the award was made payable one-half to the mother and one-half to the sister of the deceased boy.

It is the claim of the appellant that Romanie Naert, by executing the releases to the Cottage Grove Creamery Company on April 30th, has deprived the Western Union Telegraph Company of its right to sue the creamery company for the amount of compensation the telegraph company will be obliged to pay to her and to Mary Naert under the award of the board. This contention raises the only question in the case.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone and Kuhn, JJ.

Corliss, Leete & Moody and Benj. S. Pagel, all of Detroit, for appellant.

Edward H. Kennedy, of Detroit, for appellees.

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BROOKE, J. (after stating the facts as above). We have held (Vereeke v. City of Grand Rapids, 203 Mich. 85, 168 N. W. 1019) that a beneficiary, by accepting compensation under the act (Acts Extra Sess. 1912, No. 10) from her decedent's employer, did not thereby release the original wrongdoer "from liability in an action for the benefit of the heirs at law or the creditors" of the deceased. The converse of that proposition is here presented. Did Romanie Naert, by accepting a settlement as administratrix of her son's estate or as an individual for all claims against the Cottage Grove Creamery Company growing out of her son's death, thereby release her son's employer from liability under the act? We think not. The act provides (section 1 of part 6) as follows:

"If the employe, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."

As was pointed out in the Vereeke Case the act nowhere compels election on the part of the dependent as it does on the part of the injured party himself. We are disposed to hold that the releases executed by Romanie Naert to the Cottage Grove Creamery Company were of no force and effect as between the employer of the dead boy and the Cottage Grove Creamery Company, in an action brought by the telegraph company to recover the compensation it is called upon to pay under the award of the board. Section 15 of part 3 clothes the employer with the absolute right to recover such payments as it is obliged to make from the third person legally liable for the injury. Such third person, in this case the Cottage Grove Creamery Company, in adjusting a claim with the legal representatives of the injured person, must be held to have proceeded with knowledge of the fact that it might be called upon to respond to the employer, who is primarily legally liable under the terms of the act to the injured party, or to his dependents in case of his death. The Industrial Accident Board held, under such proofs as were introduced at the hearing, that the death of the boy was not caused "under circumstances creating a legal liability" in the Cottage Grove Creamery Company, that the payment of $200 to Romanie Naert was a mere gratuity, and that her releases to the Cottage Grove Creamery Company constituted no bar to her right to compensation from the telegraph company.

Under our view of the case, it is unnecessary to either agree or disagree with these holdings. So long as the telegraph company is left free to proceed against the Cottage Grove Creamery Company as though no settlement had been made, it has no reason for complaint, and that we hold to be its present status herein.

The award is affirmed.

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SUPREME COURT OF MICHIGAN.

O'BRIEN

v.

ALBERT A. ALBRECHT CO., et al. (No. 67.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SUBMISSION TO SURGICAL OPERATION.

Under the Workmen's Compensation Act, a servant who suffered accidental injury, resulting in a hernia, which could not be cured, except by an operation in which a general or local anæsthetic could be used, the physicians agreeing that an operation was advisable, should not be allowed compensation as long as he refuses to undergo the operation.

(For other cases, see Master and Servant, Dec. Dig. § 385[18].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONCURRENT COMPENSATION.

Where a carpenter received an injury while working for one master, and was receiving weekly compensation from such master for partial disability at the time he received an injury while working as a carpenter for another employer, resulting in total disability, he is not entitled to receive, under Comp. Laws 1915, § 5439, more than $10 per week, whether paid by one employer or by both.

(For other cases, see Master and Servant, Dec. Dig. § 385[5].)

Certiorari to Industrial Accident Board.

Proceeding by Thomas O'Brien under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Albert A. Albrecht Company, the employer, and the General Accident, Fire & Life Assurance Corporation, Limited, the insurance carrier. There was an award by the Industrial Accident Board, and the employer and the insurance carrier bring certiorari. Award vacated, and cause remanded.

On December 22, 1914, plaintiff, a carpenter, then in the employ of Bryant & Detwiler Company, received a severe accidental injury to both feet and both ankles. Following the accident, the Bryant & Detwiler Company and its insurer entered into an agreement with plaintiff for compensation for total disability at the rate of $9.45 per week. This agreement was approved by the board. This payment was continued for some time. It would appear that plaintiff's condition improved somewhat, and on January 18, 1916, the Bryant & Detwiler Company and its insurer entered into another agreement with plaintiff to thereafter pay for partial disability at the rate of $7 per week. This agreement was likewise approved by the board. The insurer of the Bryant & Detwiler Company continued payments under this agreement down to the time of the hearing of this case before the Industrial Accident Board, and so far as this record discloses are still making such payments. On September 27, 1917, plaintiff, while in the employ of defendant the Albert A. Albrecht Company as a carpenter, and while earning $30 per week, suffered another accidental injury, resulting in a hernia. The testimony clearly establishes the tender of an operation for the hernia, that it could be performed without administering a general anæsthetic, by application of a local anæsthetic, that it would not endanger life, and that plaintiff could not be cured of the hernia without it. The testimony also clearly establishes plaintiff's refusal to submit to the

*Decision rendered, May 29, 1919. 172 N. W. Rep. 601.

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operation. At the time of the hearing before the committee of arbitration, plaintiff was wearing a truss, getting along fairly well with it, and was earning $18 per week for work other than as a carpenter. The Industrial Accident Board awarded him $10 per week against defendant here for total disability. To review this award this writ of certiorari was allowed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.
Frederick T. Witmire, of Detroit (E. G. Martin, of counsel), for appellee.

FELLOWS, J. (after stating the facts as above). Counsel for the defendants insist that the original accident, which occurred while plaintiff was in the employ of Bryant & Detwiler Company, was the proximate cause of the second injury, and that there can be no recovery against the defendants; that the recovery should be against the Bryant & Detwiler Company under the holdings of this court in Cook v. Charles Hoerts & Son, 198 Mich. 129, 164 N. W. 464, Reiss v. Northway Motor & Manfg. Co., 201 Mich. 90, 166 N. W. 840, Cramer v. West Bay City Sugar Co., 201 Mich. 500, 167 N. W. 843, and Adams v. W. E. Wood & Co., 203 Mich. 673, 169 N. W. 845. In each of these cases the Industrial Accident Board found as a fact that the original accident was the proximate cause of the subsequent injury. There being testimony in each case to sustain such finding, this court affirmed the awards. In the instant case, while there is testimony that would have justified the board in finding that the original accident was the proximate cause of the second injury, there is also testimony justifying the finding that it was not. There is testimony in this record from which the board was justified in finding, as it did, that the accident arose out of and in the course of plaintiff's employment with the defendant.

The physician of the company and the one of plaintiff's selection both advised an operation for the hernia. Such operation is not attended with danger to life or health, and it appears to be undisputed that it affords the only reasonable prospect of restoration of plaintiff's capacity to labor at his trade, that of a carpenter. Without it he may be able to labor at such light occupation as the condition of his feet and ankles will permit, but he cannot do heavy lifting, as his trade of carpenter requires. During all the time he has refused, and still persists in his refusal, to submit to the operation advised by his own physician as well as the one in the employ of defendant. Plaintiff is an intelligent man, and whether such refusal is due to a defect of moral courage or not we are unable to say. The board did not find that his refusal was due to any ignorance or misunderstanding on his part, and no such finding would be justified on this record. Under such circumstances the case is clearly distinguishable from Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563 L. R. A. 1916A, 381, Ann. Cas. 1915D, 476, Poniatowski v. Stickley Bros. Co., 194 Mich. 294, 160 N. W. 569, and Riley v. Mason Motor Co., 199 Mich. 233, 165 N. W. 745.

We appreciate the timidity with which the average person contemplates an operation, minor as well as major. But we also appreciate that in thousands of cases operations, many of them of but minor degree, have restored incapacitated men to the army of wage-earners, and put them in position to discharge their duty to their dependents, to themselves, and to society. We are impressed that under the undisputed evidence in the case it was the plaintiff's duty to accept the tendered operation. His unequivocal refusal to follow the advice and judgment of both physicians with reference to the operation relieved defendants from further activities in that direction, and for the time being, at least, absolved them from liability. As was

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said by this court, speaking through Mr. Justice Kuhn, in Kricinovich v. Car & Foundry Co., 192 Mich. 687, 159 N. W. 362:

"Before the defendant is to be charged, in law or morals, with the duty to compensate him, the claimant should first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole."

In both this case and that of Jendrus v. Detroit Steel Product Co., supra, this court quoted with approval the following language of Lord McLaren in Donnelly v. Baird & Co., Ltd., 1 B. W. C. C. 95:

"That if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him."

In the Jendrus Case Mr. Justice Stone fully considers this question. That was a case of a major operation of a very serious character. The workman was an ignorant foreigner, who refused for some time to consent to the operation, but who finally did consent. Under all the circumstances of that case it was held that the refusal to consent to the operation was not an unreasonable one.

[1] Apply, then, the rule announced by Lord McLaren and adopted by this court to the facts of the instant case, we are impressed that plaintiff's refusal was unreasonable. The operation was not as serious a one as in the Jendrus Case. Indeed, the record discloses that it was not a serious case of hernia. The operation is not attended with danger to life or health, and could be performed by the use of either a general or local anæsthetic. The doctors agree that it is advisable, and it is not disputed that it is the only thing that can be done to effect a cure. Until the plaintiff submits to an operation, which should be at the expense of defendants, he is not entitled to compensation from them.

[2] On September 27, 1917, when plaintiff received the injury here involved, he was receiving $7 for partial disability from the Bryant & Detwiler Company. From that date to the hearing of this case he continued to receive this amount per week. Notwithstanding this fact, the board made an award against these defendants for the payment of $10 per week for the same period. So far as we are advised, plaintiff is still drawing $7 per week from the Bryant & Detwiler Company, and has this award for $10 per week against these defendants. Both injuries occurred while plaintiff was following his trade as a carpenter. His disabilities are disabilities to continue in that line of employment. The maximum of compensation for total disability fixed by the statute is $10 per week. Section 5439, Comp. Laws 1915. It must be obvious that a man cannot be more than totally disabled. It should be equally obvious that he cannot receive compensation for more than total disability. Our statute does not provide for concurrent compensation. It fixes a maximum for total disability of $10 per week, and it cannot exceed that sum, whether it is paid by one employer or by several.

The award will be vacated, and the case remanded for such proceedings as may be had not inconsistent with this opinion.

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SUPREME COURT OF MICHIGAN.

PERKINS

v.

JACKSON CUSHION SPRING CO. ET AL. (No. 5.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"ACCIDENTAL INJURY."

Where a servant developed a bone felon while putting strips in metal frames by the use of pliers, work which he had done for nearly six years in the way he was employed to do it, the felon being developed by the continuous use of the pliers, he could not recover compensation, under the Workmen's Compensation Act, for "accidental injury," although at the time the felon developed the strips were shorter than usual and required the exertion of more strength to put them in place.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, Second Series, Accidental Injury.)

Certiorari to Industrial Accident Board.

Proceeding by Claude H. Perkins under the Workmen's Compensation Act, to obtain compensation for personal injuries, opposed by the Jackson Cushion Spring Company, the employer, and the General Accident, Fire & Life Assurance Corporation, Limited, the insurer. There was an award of compensation, and the employer and the insurer bring certiorari. Reversed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone and Kuhn, JJ.

Blackman & McGraw, of Jackson, for applicant.
Kerr & Lacey, of Detroit, for respondent.

FELLOWS, J. Defendant Jackson Cushion Spring Company is an employer of labor operating under the Employers' Liability Act (Pub. Laws 1912 [Ex. Sess.] No. 10) with defendant General Accident, Fire & Life Assurance Corporation, Limited, as its insurer. They here contest an award of $45 for disability and $26 for hospital and medical expenses allowed to claimant who had worked for the employer for nearly six years. Claimant's work consisted in putting strips in metal frames by the use of a pair of pliers. In this work a bone felon developed, resulting in disability for 6½ weeks, and necessitating hospital and medical expenses to the amount of $26. The testimony shows that the strips were shorter than usual, and required the exertion of more strength to put them in place. There was no abrasion of the skin resulting in infection, but the infection developed between the bone and periosteum, the covering of the bone. This might have resulted from a blow or by continued pressure. There was no evidence of a blow. Was this an "accident" within the meaning of the act? I am unable to distinguish this case upon principle from that of Roach v. Kelsey Wheel Co., 200 Mich. 299, 167 N. W. 33. In that case the workman was employed in tearing down brickwork from around a boiler. The place had a temperature of 136 degrees. The workman suffered a heat stroke, resulting in death. A majority of the court entertained

*Decision rendered, May 29, 1919. 172 N. W. Rep. 374.

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the view that the workman "was doing the work which he and his associates were employed to do exactly in the manner they expected to do it," and upon the authority of Kutschmar v. Briggs Manfg. Co., 197 Mich. 146, 163 N. W. 933, L. R. A 1918B, 1133, and Johnson v. Mining Co., 199 Mich. 218, 165 S. W. 650, vacated the award. On the same day the Roach Case was decided opinions in Tackles v. Bryant & Detwiler Co., 200 Mich. 350, 167 N. W. 36, and Guthrie v. Detroit Shipbuilding Co., 200 Mich. 355, 167 N. W. 37, to the same effect were handed down. In the case of Kutschmar v. Briggs Manfg. Co., supra, Mr. Justice Brooke, speaking for the court, said:

"We are of opinion that an employe who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the Compensation Act, which as we have held provides compensation for accidental injury only."

In the case of Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas. 1916D, 689, it was said in the unanimous opinion of the court, written by Mr. Justice Stone:

"We are of opinion that in the Michigan act it was not the intention of the Legislature to provide compensation for industrial or occupational diseases, but for injuries arising from accidents alone."

See, also, Stombaugh v. Peerless Wire Fence Co., 198 Mich. 445, 164 N. W. 537.

In the instant case the workman was doing the work he was employed to do, had done for nearly six years, in the way he was employed to do it, and in the way it had been done by him for a long time. That the work done by a laborer one day is harder than on other days is not an accident within the meaning of the act. There is no evidence in the record of the intervention of any untoward or accidental happening producing the injury. There was no blow or sudden strain. The felon was developed by the continuous use of the pliers.

Under the authorities cited we are constrained to reverse the case.

SUPREME COURT OF MICHIGAN.

ROSE

v.

DESMOND CHARCOAL & CHEMICAL CO. Et Al. (No. 71)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —REFUSAL TO SUBMIT TO EXAMINATION—SUSPENSION OF COMPENSATION.

Where the evidence, on petition of the employer and insurer for permission to cease payments of compensation to the injured employe, tends strongly to prove the employe has recovered, and leaves small doubt in the mind on the point, his refusal to submit his person to expert X-ray examination demands the application of Workmen's Compensation Act, pt. 2, § 19, suspending his right to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

*Decision rendered, May 29, 1919. 172 N. W. Rep. 415.

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Certiorari to Industrial Accident Board.

Proceedings for compensation for injuries under the Workmen's Compensation Act by Henry J. Rose, opposed by the Desmond Charcoal & Chemical Company, the employer, and the General Accident, Fire & Life Assurance Corporation, Limited, the insurer. Compensation was awarded by agreement, and the employer and insurer petition for permission to cease payments. To review an order of the Industrial Accident Board denying the petition, the employer and insurer bring certiorari. Order set aside.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.
Willard J. Banyon, of St. Joseph, for appellee.

OSTRANDER, J. Henry J. Rose, an employe of the Desmond Charcoal & Chemical Company, was injured. An agreement for compensation was made, was approved by the Industrial Accident Board, and, performing it, claimant has been paid from January 5, 1915, the date of injury, to June 11, 1918, a period of 179 weeks. In June, 1918, the employer and the insurance company filed with the Industrial Accident Board a petition as follows:

"That on January 5, 1915, and for some time prior thereto, one Henry J. Rose was in the employ of the Desmond Charcoal & Chemical Company; that on the last-named date, to wit, January 5, 1915, said claimant, while in the employ of said respondents and petitioners, at what is commonly known as Carter's Siding, in the county of Benzie and state of Michigan, received an accidental injury as follows: While wheeling ashes, tripped on plank across railroad track, and fell, tearing ligaments on kneecap.

"That in due course thereafter an agreement in regard to compensation was duly executed by and between the respective parties, whereby said petitioners were to pay compensation to said claimant at the rate of $6.125 per week, during period of disability in accordance with the provisions of the Workmen's Compensation Law, so called; that, in accordance with said agreement, your petitioners have paid or caused to be paid to said claimant compensation in accordance with said agreement from the date of injury, to wit, January 5, 1915, to June 11, 1918.

"Your petitioners respectfully represent that through duly authorized agents and representatives they have caused a careful and complete investigation to be made, in order to determine whether or not claimant is entitled to further compensation because of said accidental injury. Petitioners represent that they are informed and believe, and therefore expressly charge the truth to be, that the injuries received by said claimant as a result of accident on the date above designated were not of such a serious nature as to cause disability during the period for which compensation has been paid, and that said claimant has fully recovered from the effects of said accidental injury, and is not entitled to receive further compensation from petitioners.

"Petitioners respectfully represent that for some considerable period prior to March 16, 1918, they were negotiating with said claimant with reference to making arrangements whereby claimant would report to a competent, disinterested, and highly qualified physician and surgeon, at either Chicago, Ill., or Detroit, Mich., for the purpose of having a careful, complete, and thorough physical examination made to determine the exact physical condition of said claimant; that said petitioners agreed with said claimant to advance to him and defray all expenses incidental to making either the trip to Chicago, Ill., or Detroit, Mich., for the purpose of being examined and attended, or both, and that all expenses,

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including the charge of physician and surgeon, would be paid by said petitioners; that said claimant on several occasions agreed with said petitioners that he would report at the time and place designated by petitioners for such medical attention as was deemed necessary, and requested your said petitioners to advance to him money to defray expenses. Petitioners state, however, that on each and every occasion said claimant at the last moment offered some excuse, and thus failed to comply with his many and divers agreements with your respondents and petitioners with reference to medical services.

"Your petitioners further represent that on the 16th day of March, 1918, Dr. Arche C. Hall, a duly qualified physician and surgeon, licensed to practice his profession as such, with offices in the David Whitney Building, Detroit, Mich., at the request of your said petitioners, the General Accident Fire & Life Assurance Corporation, Limited, called at the then residence of said claimant, to wit, 192 Ninth street, Benton Harbor, Mich., and made a physical examination; that on April 30, 1918, said doctor, at the request of petitioner the insurance company, submitted a written detailed report indicating the result of said physical examination, a copy of which report is included in this petition and is attached hereto, being marked as Exhibit A.

"Your petitioners also represent that prior to April 30, 1918, and on or about April 18, 1918, said Dr. Hall made an oral report to your said petitioners' representatives, to wit, Kerr & Lacey, with offices 1719 Dime Bank Building, Detroit, Mich., which said oral report was substantially the same as indicated by Exhibit A; that said attorneys, acting for and in behalf of your petitioners, wrote the Industrial Accident Board under date of April 18, 1918, in accordance with copy of said letter, which is made a part of this petition, and which is attached hereto and marked Exhibit B.

"That some time thereafter, on or about May 5, 1918, said petitioners. through their said attorneys, Kerr & Lacey, received a letter from the Industrial Accident Board which is dated May 4, 1918, and which is made a part of this petition, being hereto attached and marked Exhibit C.

"In view of the facts and circumstances thus presented, your petitioners respectfully represent that they should be relieved from further payment of compensation to said claimant on and after the 11th day of June, 1918, for the following reasons:

"(1) Said claimant, Henry J. Rose, has fully recovered from the effects of accidental injury received while in the employ of respondent and petitioner Desmond Charcoal & Chemical Company under date of January 5, 1915.

"(2) That, if it should be determined that the proofs which said respondents and petitioners are able to submit in support of this petition are not sufficient to establish to a certainty the exact physical condition of said claimant, said respondents and petitioners should be relieved from making further payments of compensation, because of the unreasonable conduct and attitude of said claimant in refusing to consummate arrangements whereby further medical attention could be given at the expense of said respondents and petitioners, including careful and thorough physical examination by some disinterested and highly qualified physician and surgeon, and also such X-ray examinations as were considered necessary by such physician and surgeon to make a proper diagnosis of the case.

"(3) Respondents and petitioners have acted with fairness and in good faith with reference to the selection of a physician and surgeon to make proper physical examination, including X-ray pictures, to determine the true situation from a medical standpoint; that the attitude of said claimant in his refusal to accept proposition submitted by respondents and petitioners as to further medical attention, or to co-operate in the selection of a disinterested and qualified physician and surgeon, is unreasonable.

"Wherefore your petitioners pray:

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"(A) That a copy of this petition as filed be forwarded to said claimant, and that he be directed to answer the same, paragraph for paragraph, and that upon his failure so to do, or upon his admission that the allegations therein contained are true, that the same be treated as such, and that said respondents and petitioners be relieved from further payment of compensation.

"(B) That if said claimant refuses or neglects to answer the allegations contained in said petition, or in answering the same denies the allegations therein contained, or if it is the desire of the Industrial Accident Board that proof be submitted to substantiate the allegations in said petition, that said respondents and petitioners be allowed a reasonable time within which to submit testimony in the form of depositions, of various doctors and witnesses, whose knowledge in the premises is important in the determination of the issues.

"(C) In the event it is the desire of the Industrial Accident Board that proofs be submitted in the form of deposition, that after the receipt thereof the matter be set for hearing before the full board, at its offices in the city of Lansing, in accordance with the rules and practice of said board in such cases made and provided.

"(D) That upon hearing of said cause an order be entered by the Industrial Accident Board relieving said respondents and petitioners from further payments of compensation.

"(E) That respondents and petitioners may have such other and further relief in the premises as is agreeable to equity and good conscience, and as is also just and proper."

Various papers were attached to the petition, as referred to therein. Later depositions were taken by respondents upon notice and submitted to the board. The board requested claimant to report to a physician in this city (Benton Harbor, Mich.) for a medical examination. The examination was made and reported by the physician to the board. Finally, in October, 1918, the board made its order (the one appealed from) which reads:

"A petition having been filed by respondents in the above-entitled cause praying, for reasons therein set forth, that they be permitted to cease payments of compensation to said applicant, and the same having come on to be heard before the board on July 9, 1918, and due consideration having been had of the facts and circumstances of the case, it is ordered and adjudged that said petition be, and the same is hereby, denied, and said applicant is entitled to receive and recover compensation from said respondents as per the agreement in the files from the date of the last payment, March 11, 1918, to the date of the filing of said petition, June 8, 1918. It is further ordered that payments be suspended during the period when applicant is receiving the same or higher wages than he was receiving at the time of the accident, and, should there be a diminution of wages, he shall be entitled to receive compensation at the rate of one-half the difference between the wages he was receiving at the time of the accident and that which he is able to earn thereafter, all in accordance with the terms of the Workmen's Compensation Law."

Setting up a brief history of the case, the petition for the writ of certiorari assigns as error:

"(1) There is no testimony upon which the order of the Industrial Accident Board can be based.

"(A) Testimony submitted in support of petition to be relieved from further payment of compensation was conclusive, and to the effect that claimant had fully recovered from the effects of accidental injury.

"(B) Report of Dr. B. G. Watson, the impartial physician, selected by the Industrial Accident Board to make careful and complete examination, was also to the effect that claimant had fully recovered from the effects of accidental injury.

"(2) The action of the Industrial Accident Board in entering the

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order of October 26, 1918, is contrary to the terms and provisions of the Workmen's Compensation Law, so called."

The printed record in this court contains 153 pages, a large part of which is made up of matter sent up over the objection of plaintiffs in certiorari. What plaintiffs in certiorari say is that such evidence as they have submitted to the board, and such as the board ordered to be taken, points conclusively to the fact that claimant has recovered from the effects of his injury. If there is any doubt about it, then, in view of the showing made, payments should be suspended until a further complete X-ray examination of claimant's limb is made. In other words, plaintiffs in certiorari assert that claimant has recovered and is, in any event, recalcitrant because he will not, at the expense of the employer, present himself for such complete and thorough examination as will demonstrate his present condition. As affecting these questions, the larger part of the return is of no account, while the printing of it entails an unnecessary expense upon the interested parties.

Whether claimant's recovery is established depends upon the evidence of his present condition. Whether evidence is lacking and can be obtained only by co-operation of the claimant, and he refuses to submit to examination, must be determined by the evidence relating to those subjects. Very little more than such evidence needed to be returned with the writ.

We have read the evidence upon the subject of claimant's injury and condition, the medical testimony and his own. We think it cannot be said that it is conclusive establishing the fact that he has recovered from his injury. It must be said there is some, if slight, evidence supporting a contrary conclusion. It tends strongly to prove that claimant is recovered. But the doubt which it leaves in the mind is a small one, and the refusals of claimant to submit his person to expert X-ray examination, demand, we think application of section 19, pt. 2, No. 10, Pub. Acts 1912 (Ex. Sess.), and such application will suspend his right to compensation. This, in our opinion, is the order which the board ought to have made in the premises. We do not intimate that it is our opinion that he has not had expert X-ray examination, which was some time in the year 1915. But it is a fair consensus of the opinions expressed by the medical witnesses that any doubts now existing about his condition may be resolved by an expert X-ray examination made presently. Claimant has only to give his time in order that such examination may be made.

Order set aside.

SUPREME COURT OF MICHIGAN.

RUBIN

v.

FISHER BODY CORPORATION ET AL. (No. 76.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM FOR COMPENSATION.

An injured servant must unequivocally claim compensation under the Workmen's Compensation Act within the period of six months fixed by the statute.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

*Decision rendered, May 29, 1919. 172 N. W. Rep. 534.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM FOR COMPENSATION—GUESS OR PROBABILITY.

Where the Industrial Accident Board, in reaching conclusion that a claim for compensation was made, determined that the injured servant probably did not use the term "compensation," but said he wanted pay for the injury to his eye, an award could not be predicated on such guess or probability of an essential matter.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Certiorari to Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) by Sam Rubin, opposed by the Fisher Body Corporation, employer, and the Employers' Liability Assurance Corporation, Limited, insurer. Compensation was awarded by the Industrial Accident Board, and the employer and insurer bring certiorari. Award set aside.

Claimant was injured on the 19th day of June, 1917, while in the employ of the defendant Fisher Body Corporation. On December 25, 1917, he filed a written claim for compensation for loss of the sight in his right eye. The record shows that claimant reported his accident to his foreman and was sent to Dr. Schorr for treatment, who in turn sent him to Dr. Bentley, an eye specialist, by whom he was treated for about a month. On July 21, 1917, the doctor advised him that he was able to return to work. He did return to work for the defendant, but only put in about 14 or 15 hours' time, when he quit and sought employment elsewhere. For a short time he took and sold pictures on the street then went into the peddling business with his brother, operating near the premises of the defendant Fisher Body Corporation, where they sold fruit to the employes of that concern during the noon hour. Although no written claim for compensation was filed within the statutory period, it was asserted by claimant that during the period when he was selling fruit to the employes of the Fisher Body Corporation he frequently saw and had conversations with Mr. Caldmeyer, his former foreman. He testified:

"Q You told this foreman that you expected that you wanted compensation for the loss of the eye? A. Yes, sir; I did. I told Mr. Caldmeyer, who is the general foreman. * * * Every day I used to come in and ask Mr. Caldmeyer what is going to be with me? Are you going to give me some benefit? J cannot make a living. I had to go on the street. * * * I asked him what is going to be, 'Am I going to have any benefit out of it?' He says he don't know anything about it. He says to me: 'We will try to give you some work, and then if we cannot find you a job we will see what we got to do with you.' * * *

"Q. Caldmeyer? A. Yes, sir; that is his name.

"Q. Then you deny telling me you never demanded any compensation before? A. Why, I don't understand the word 'compensation.'

"Q. Well, damages, for your eye, pay for your eye? A. I never spoke for damages, but I told him what benefit am I going to have for it, am I going to have any pay for leave until I got fixed up on my eye. I have three children to support.

"Q. You spoke to the foreman about that? A. Yes, sir; I did.

"Q. You did not speak to any officer of the company? A. I didn't know any officer around there. He is the only man that is around there.

"Q. The only man you knew?"

An award was denied by the arbitration committee upon the ground that—

"No claim for compensation was made within six months from the date of the accident."

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On appeal to the full board, the determination of the arbitration committee was reversed and an award of $10 per week for 100 weeks as for the loss of an eye was made. In treating the question of notice the board said:

"We think that under the testimony he made an unequivocal claim on a good many different occasions during the six months immediately following the accident. We have not quoted all the testimony concerning the claim. He was evidently a man of little education and not too much intelligence. He did not even understand the meaning of the word 'compensation,' as he repeatedly testified. The persons to whom he says he made a claim for compensation did not deny that he made such a claim. He probably did not use the word 'compensation.' He probably said he wanted pay for the injury to his eye. He certainly had the question of some sort of recompense for the injury to his eye up with the employers' representatives many times. While he had a trace of vision in his eye, his eye was practically lost, and the board does not think it could possibly find upon this record that the applicant had not made a claim for compensation within six months after the accident happened to him."

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Frederick T. Witmire, of Detroit, for appellants.
Frank J. Riggs, of Detroit, for appellee.

Brooke, J. (after stating the facts as above). [1, 2] Defendants in this court urge that the board was in error in holding that claimant was not barred from recovery upon the ground that he had made no claim for compensation within six months after the date of the injury. We think appellants' contention sound. We have held that a claim for compensation must be an unequivocal one (Baase v. Banner Coal Co., 202 Mich. 57, 167 N. W. 954; Brown v. Weston-Mott Co., 202 Mich. 592, 168 N. W. 437), and the following cases are conclusive upon the point that such claim must be made within the period of six months fixed by the statute: Cooke v. Holland Furnace Co., 200 Mich. 192, 166 N. W. 1013, L. R. A. 1918E, 552; Kalucki v. American Car & Foundry Co., 200 Mich. 604, 166 N. W. 1011; Dane v. Michigan United Traction Co., 200 Mich. 612, 166 N. W. 1017; Schild v. Pere Marquette Railroad Co., 200 Mich. 614, 166 N. W. 1018; Peterson v. Fisher Body Co., 201 Mich. 529, 167 N. W. 987. The Industrial Accident Board in reaching the conclusion that a claim was made said:

"He probably did not use the word 'compensation.' He probably said he wanted pay for the injury to his eye."

Legal liability may not be predicated on mere guess or probability. Draper v. Regents of University of Michigan, 195 Mich. 449, 161 N. W. 956.

The award must be set aside.

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SUPREME COURT OF MICHIGAN.

CROSBY

v.

THORP-HAWLEY CO. ET AL. (No. 62.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —ACCIDENTAL INJURY—"ACCIDENT."

Where the traveling salesman was delayed by a customer and missed a bus, and had to carry grips weighing 80 pounds to a station, and became excited when he heard the train, and ran and broke a blood vessel in his brain, causing paralysis, his injury was the result of an "accident," within Workmen's Compensation Act.

(For other cases, see Master and Srvant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident.)

Certiorari to Industrial Accident Board.

Proceedings by Charles Crosby under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) to obtain compensation for injuries, opposed by the Thorp-Hawley Company, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, insurance carrier. There was an award, and the employer and insurance carrier bring certiorari. Award affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.

Claude S. Carney, of Kalamazoo, for applicant and appellee.

KUHN, J. The claimant, on June 21, 1917, had been in the employ of the defendant, wholesale candy merchants, for the period of 24 years. In the course of his employment, at the date aforesaid, it was necessary for him to take with him two sample cases and a grip containing his personal effects, the total weight of the cases and the grip being shown to be about 80 pounds. On the said 21st day of June, while at Sturgis, Mich., the claimant was delayed by a customer, and as a result missed the conveyance which, it is his claim, he ordinarily used in going from the hotel to the railroad station. He thereupon hurried from the hotel toward the depot, carrying the three grips. Before he was very far from the hotel, he heard the train which he intended to take to Howe, Ind., claimed to have become excited, and ran the remainder of the way with his three grips. He arrived at the train before it started, but after he got onto the train it is his claim that a blackness passed over his face, and his head felt bad, and he felt dizzy. He left the train at Howe, Ind., went to the hotel, and it is his claim that his hand became numb, and that he could not control his right arm, and felt a lack of control in his right leg, and was there attended by a physician. He returned to his home in Kalamazoo, and the next morning Dr. Rush McNair, his family physician, was called to attend him. He found that the claimant was suffering from paralysis, caused by the breaking of a blood vessel in his brain. The following is an excerpt from his testimony:

*Decision rendered, May 29, 1919. 172 N. W. Rep. 535.

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"Q. What condition did you find him in? A. I found Mr. Crosby suffering from nearly complete paralysis of his entire right side; he had very little power of grasp in his right hand. He could use his leg somewhat. His tongue also was affected and the side of his face; his voice was thick, as if he had something in his mouth. He was also mentally depressed; he was confused and crying. He was unable at that moment to care for himself. He gave me a description of his experience on the day before and how he felt the evening before and during the night. I got enough out of him to get the history about as he has given it to-day.

"Q. You have heard his description of it here? A. Yes, sir.

"Q. What caused this paralysis? A. It was due to the rupture of a blood vessel in his brain.

"Q. Did you treat him from time to time? A. Yes, sir; from that time to the present time.

"Q. Of course he was unable to work at that time? A. Absolutely.

"Q. Assuming that on the day before you saw him, he was in ordinary good health, about his business as a traveling salesman, which involved traveling by train from one city to another, through Michigan and Northern Indiana, and that while at Sturgis he was, because of being detained, made late for his train, and missed the bus, and on that account obliged to carry an unusual load of a third grip, which made it necessary for him to hold in one hand two grips, the left hand; on the way to the depot with this extra load occasioned by the third grip, he heard the train pull in about two blocks away, and he became excited and started to run for the train, and, on account of the overexertion and excitement when he got to the train, he felt dizzy, and a black cloud crossed his face, as he put it, and this condition that found him in, and also he noticed immediately following that running to the train that he had lost partial control at least of the left side—that was the side that was paralyzed, was it not? A. The right side.

"Q. (resuming). The right side, the right arm, and noticed that his tongue was thick, and he noticed during the day that he had lost partial control of his right leg—what would you say, assuming the conditions he has testified to be true, and the history of the case, what would be your judgment as to what caused this accident. A. There would be two factors in the case. First would be the unusual physical exertion.

"Q. This extra load he was carrying? A. The extra load and running for the train, secondly, and perhaps more important would be the excitement of running to catch the train. The mental perturbation that occurs when one is afraid they are going to miss a train, and run to catch it.

"Q. How would these matters cause a breaking of a blood vessel? A. For the simple reason that under mental exertion the blood pressure rises in the blood vessels, and the heart has to pump harder to pump the blood into the muscles that are taut and contracted, consequently under excitement the blood pressure will also raise, so in this case there would be two factors, two active factors, to cause the rise of blood pressure, and if there was a weak place anywhere in the circulatory system, that was unable to stand the strain, it would give away, and that is what happened in this case.

"Q. As I understand you, then, the extra load, the unusual running to catch the train, and the excitement combined, those three things, caused the extra load on the blood vessels? A. Absolutely.

"Q. And caused this blood vessel to break? A. Yes, sir.

"Q. And that, in turn, caused the paralysis? A. Yes, sir."

Whether or not, under these circumstances, the claimant can be said to have met with an accident is the sole question presented upon this record. The Industrial Accident Board found that the facts here presented make out a stronger case than the facts involved in Schroetke v. Jackson-Church Co., 193 Mich. 616, 160 N. W. 383, and relied upon that

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decision in awarding the claimant compensation. In my opinion, the conclusion of the Industrial Accident Board with reference thereto was fully warranted, and I am unable to distinguish the situation here presented from the finding in the Schroetke Case, which case has not been overruled by this court, but, in fact, has been cited in the following decisions: Van Gorder v. Packard Motorcar Co., 195 Mich. 588, 162 N. W. 107, L. R. A. 1917E, 522; Stombaugh v. Peerless Wire Fence Co., 198 Mich. 445, 164 N. W. 537; Johnson v. Mary Charlotte Mining Co., 199 Mich. 218, 165 N. W. 650; Roach v. Kelsey Wheel Co., 200 Mich. 299, 167 N. W. 33; Tackles v. Bryant & Detwiler Co., 200 Mich. 350, 167 N. W. 36; Guthrie v. Detroit Shipbuilding Co., 200 Mich. 355, 167 N. W. 37.

The finding of the Industrial Accident Board should be affirmed, and compensation awarded in accordance therewith.

Bird, C. J., and Stone, Moore, and Fellows, JJ., concurred with Kuhn, J.

Brooke, J. I am of opinion that the record contains no evidence of an accident.

Ostrander and Steere, JJ., concurred with Brooke, J.

SUPREME COURT OF MICHIGAN.

GAGE

v.

BOARD OF CONTROL OF PONTIAC STATE HOSPITAL.
(No. 17.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIABILITY OF MASTER FOR MEDICAL EXPENSES.

Where a servant of a state hospital did not immediately notify his employer of injuries, but obtained services of his family physician and was taken to another hospital, employer was liable for such reasonable medical aid as was received by the servant, after notifying employer as to where he was located and his need for medical aid, where employer, after such notice, did not offer to furnish the same.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MEDICAL EXPENSES—RIGHT OF EMPLOYER TO PROVIDE MEDICAL AND SURGICAL TREATMENT.

Where the circumstances and the condition of the injured servant present an emergency demanding prompt action, he may be warranted in securing needed medical service at the employer's expense, without first giving employer notice or opportunity to offer the same, as provided by the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MEDICAL AID—EMERGENCY—QUESTIONS OF FACT.

The question of whether there is in a particular case such a pressing necessity as will excuse an injured servant from notifying his employer of his injuries before obtaining medical aid is primarily one of fact.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

*Decision rendered, May 29, 1919. 172 N. W. Rep. 536.

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4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MEDICAL AID—EMERGENCY—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a conclusion of the Industrial Accident Board that such an emergency existed that servant was warranted in obtaining medical aid without first notifying the employer as provided by the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Certiorari to Industrial Accident Board.

Proceeding by Clinton C. Gage under the Workmen's Compensation Act to obtain compensation for a personal injury, opposed by the Board of Control of the Pontiac State Hospital, the employer. There was an award and employer brings certiorari. Affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Alex. J. Groesbeck, Atty. Gen., and Clare Retan, Asst. Atty. Gen., for appellant.

A. Floyd Blakeslee, of Pontiac, for appellee.

STEERE, J. In this case defendant questions the validity of an award of $189 made against it by the State Industrial Accident Board in favor of plaintiff, for medical, surgical, and hospital expenses incurred by him as the result of an accidental injury which he sustained on September 15, 1917, while in defendant's employ.

The necessity for such services and the reasonableness of the charges made therefor are apparently not questioned, but it is contended that defendant was entitled under the Employers' Liability Law to notice of plaintiff's injury and need of medical attendance by reason of it, and a reasonable opportunity to itself furnish all needed medical, surgical, and hospital service, before plaintiff could legally secure the same of others at defendant's expense. This contention is based on the provisions of section 4, part 2, of the Workmen's Compensation Act (section 5434, Comp. Laws 1915), which is as follows:

"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, free medical and hospital services and medicines when they are needed."

Plaintiff's injury was a hernia. The facts are practically undisputed, and the case has been adjusted in all other respects by appropriate proceedings before the Industrial Accident Board, based on an agreement in regard to compensation approved by the board.

The issue raised is pointedly presented and concisely argued by counsel on both sides, and by them narrowed to the question of whether, under the claimed exigencies shown here, the injured party may, pending reasonable notice to the employer of the necessity for medical and surgical attention, and until the latter after reasonable notice furnishes the same, secure such attention at the expense of the employer. Counsel for plaintiff frankly concedes it inferable from the duty imposed by the statute that in the majority of cases and as a general rule the employer should be entitled to furnish, dictate where an injured employee shall obtain, the necessary medical, surgical, and hospital attendance, and broadly admit such general rule proper for the protection of both parties, "in order to prevent an unscrupulous physician from exploiting the injury to his own benefit and to prevent, perhaps, a possibility of malingering on the part of the injured employee." But no such evil elements are claimed or suggested as present in this case, and it is urged for plaintiff to be also fairly inferable, from the act as a whole and the particular subject

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to which the section applies, that the injured party may secure such services at the expense of the employer in exceptional cases involving manifestations of emergency and demanding prompt attention, as in the instant case, and whether such excepting conditions existed is a question of fact for the accident board to determine.

Plaintiff's home was on Johnson avenue in the city of Pontiac. He was when injured, and had been for many years, employed by defendant at the Pontiac State Hospital for the Insane, in its building department. On the day of his injury he was working in a tunnel, where it was somewhat dark, and in attempting to lift or carry out some material experienced an injury, the nature of which he did not then apparently understand or localize, but which caused him to suspend work, telling his "boss," who was the superintendent, that he was sick and had to go home, which he did, arriving there between 9 and 10 o'clock, as his wife testified, not yet knowing what ailed him. Shortly before noon he discovered that he was suffering from a hernia. During the day he experienced increasing pain and grew weaker. His wife summoned their family physician, Dr. Fox, who called shortly after supper, and found plaintiff suffering with a strangulated femoral hernia, which in the doctor's opinion demanded prompt surgical action, and he at once called in for consultation a surgeon in whom he had confidence, named Dr. Howlett, and an immediate operation was deemed by them necessary to save the patient's life. He was thereupon taken in an ambulance to the Pontiac City Hospital before dark that evening, and operated upon almost immediately, remaining in the hospital 19 days. He made a good recovery, and at the time of hearing before the board had returned to his work in defendant's employ. The bill in question is for surgical and medical attendance, ambulance, and hospital expenses, the largest item being $100 for the operation, furnished within three weeks after the injury. Of the necessity for prompt action after the physicians had determined Gage's condition Dr. Fox testified in part as follows:

"Q. Was there any particular urgency there? A. Very much so; yes. Q. What was the hurry? A. What we call strangulated hernia. It is where the bowel goes down and becomes strangulated. It is strangulated there, and the bands go round to the outer part, and the circulation is shut off. It is sometimes only a few hours before gangrene will set in in the bowels, which means almost certain death. Q. For that reason you considered that an immediate operation was necessary? A. Yes, sir. Q. In your opinion a delay would have been fatal? A. Yes, sir. In the morning this man would have been beyond help."

The Pontiac State Hospital is one of the state asylums for the insane, formerly designated as the "Eastern Michigan Asylum" (section 1311, Comp. Laws 1915), but given its present name in 1911, without change of character or functions, by an act devoted to "changing the names of the Michigan Asylums for the Insane" (section 1365, Comp. Laws 1915). These institutions have, under the statute providing for them, a medical superintendent, with adequate medical and surgical staff for the purposes of the institution, which is the care and treatment of insane inmates committed to them by the pro ate courts and designated in the act as "patients." Dr. Christian was then medical superintendent of the institution. Mr. Halsey, its steward, testified it was customary to furnish medical attendance and hospital service to its employees in need of the same; that they did surgical work there, but had a surgeon, Dr. Mack, in Detroit, whom they called in to do "the surgical work—the complicated work."

Defendant contends that reasonable notice and opportunity were not given it of plaintiff's injury and needs, and, as the statute makes it mandatory for the employer to furnish the same, plaintiff was not authorized to secure such service at its expense. The only notice plaintiff gave in relation to the matter was when he quit work in the middle of the forenoon, telling his boss, the superintendent, that he was sick and had

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to go home. This, while not definite notice of an accidental injury, was at least notice of a sudden physical affliction, which rendered him incapable of continuing at work. Plaintiff, who testified he never was advised and did not then know he could receive medical attention at the hospital, states that his condition was such that "everything was hurly-burly" with him anyway, and his "mind was occupied in other ways"; that he never noticed them himself, and did not know who did. His wife, who first cared for him after he reached home, testified that she tried to get their family physician some time before she succeeded; that after he came and she learned of the seriousness of her husband's condition she "took on and cried," for he had to be taken to the hospital immediately; but that she notified defendant the next morning, which she says was "the first chance I had"; that she promptly went up there the next morning, and tried to see Dr. Christian, to notify him, but he was not in, and she told his assistant, Dr. Butler, about it—of the operation and that her husband was in the city hospital—and asked if they could do anything for him, saying "he was entitled to have something done by them for him, if they did anything for any of their employees," to which Dr. Butler replied he would report the matter to Dr. Christian as soon as he returned, and, when she asked if it was necessary for her to do so, he replied it was not.

[1] It appears undisputed that within 24 hours after the accident defendant was fully notified of it, and told where plaintiff then was by his wife, who requested aid in his behalf. Defendant then had notice, with request for proper attention, certainly giving opportunity to offer, and so far as shown to furnish from that time on, all needed medical and hospital services during the remaining 20 days of the prescribed 3 weeks. It is not shown or claimed that defendant at any time furnished or offered to furnish plaintiff any free medical or hospital services or medicines for his accidental injury while in its employ. After such notice, request, and reasonable opportunity to furnish or offer the required treatment, and failure to act, defendant was clearly liable for plaintiff's reasonable expenses in securing the same during the remainder of the 3 weeks after the injury.

[2-4] The more serious question is that of the expenses incurred in the claimed emergency prior to notice. Of this contention the board found and held as follows:

"It would seem that ordinarily the employer should be notified of an accident and given an opportunity to provide medical and surgical treatment to an injured workman. However, in a case like the instant one, where the employee is in such a serious condition as to require an immediate operation, and where his life would be endangered by any delay, the board believes that he should have the right to secure the necessary attention as soon as possible, and that the employer should bear the expense of the same. * * * Respondent failed and neglected to offer any medical services, even after receiving notice of the injury. The board believes that because of applicant's serious condition, the undisputed testimony of his physician being that an immediate operation was imperative in order to save his life, the case was brought within the emergency class, and respondent should pay the expenses incurred by the applicant for medical and hospital services during the first three weeks after his injury as provided by law."

In Honnold on Workmen's Compensation, vol. 1, § 193, where the admitted general rule of the employer's right to select the physician and furnish the necessary services for treatment of an injured employee is discussed, the author adds as a constructive corollary:

"But this does not militate against the employee's right to obtain medical and surgical treatment at the expense of his employer in the interim between the happening of the injury and time for notice to the employer of the employee's needs, subject to the right of the employer or insurer to change physicians at the close of the emergency treatment."

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The authority to support this text is found in 1 Cal. Industrial Accident Cases (Dec.) pp. 385-575. Counsel do not cite, nor have we found, any decisions by courts of last resort where this question has been directly involved. Counsel for defendant cite but two cases which relate to liability under a similar provision for medical services, where the employee has procured the same without the employer's knowledge or consent. Keigher v. Gen. Electric Co., 173 App. Div. 207, 158 N. Y. Supp. 939, and Milwaukee v. Miller et al., 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. While the cases deal with that subject, the exact question at issue here was not involved. Counsel quote from the Keigher Case as follows:

"But the duty to provide certain services, which is cast by the statute upon the employer, naturally implies the right of the latter to select his own agencies for the proper fulfilment of the duty, unless language is found in the statute indicating a contrary intent."

An examination of that case shows that defendant had provided for the injured employee a competent physician and surgeon, who took charge of the case and rendered professional service for a time, when the employee refused longer to accept his services, and requested the employment of a certain physician of his own selection, which defendant declined to do. The physician the employee desired thereafter rendered him medical services, which defendant declined to pay for. The court held that under these circumstances the general rule applied, and sustained the refusal. No question of intervening jeopardy before notice, or pressing emergency, was involved.

In Milwaukee v. Miller, supra, the employee, Miller, suffered an injury to his great toe, and without requesting medical service, or notifying the municipality of his injury, employed his own physician and nurse. Eleven days after the accident, amputation of the toe was deemed necessary by his physician, who then performed the operation. Ten days later, and three weeks after the accident, Miller for the first time notified the city of his injury and made claim for compensation, but even then gave no notice of his requiring medical services. Some time after receiving this notice the city tendered him the services of a competent physician, which he did not accept, and continued to employ his own physician until he had charged up 130 visits and the bill for medical service and nursing, which Miller claimed the city should pay, amounted to over $250. This the court declared "preposterous," in view of the nature of the accident and actual needs of the patient. No question of emergency was involved; but in discussing the facts, and applying the general rule of the employer's right to notice, etc., the court to a degree recognized an inferable exception to it under possible circumstances as follows:

"The result is that Miller, since he failed to notify his employer of his need, never had competency to employ a physician at the expense of the city of Milwaukee, except for such reasonable length of time as necessarily intervened between his injury and reasonable opportunity after due notice for the city to exercise its privilege."

In that case the general rule, conceded here, that the law should be construed and applied so as to secure to the employer reasonable opportunity to conserve the related interests of both parties to the misfortune by supplying the medical and surgical needs of the injured is instructively discussed at length. Running through the discussion is an indicated recognition that by fair construction of the act there may be exceptional cases, where it is permissible and in the interest of both parties for the injured party to promptly secure such services before notice, although "ordinarily" reasonable opportunity should be first accorded by him to the employer. It is pointed out that the reason of the provision is twofold:

"First. As a rule an employer is more competent to judge the efficiency of the doctor employed and to provide efficient medical and

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surgical treatment. Second. It is to the interest of the employer to furnish the very best medical and surgical treatment, so as to minimize the result of the injury and to secure as early a recovery as possible. The more serious the result of the injury, the more the employer must pay."

In this case there was, as the result of prompt and efficient action after plaintiff's critical condition was discovered, an early and full recovery, at small expense to defendant compared with a death loss, which was threatened and would have been the result of delay until the following morning, as the undisputed medical testimony shows. It is indicated that plaintiff, after his return home and his distress increased, was not in a physical or mental condition to judge or act in the matter. His wife is not shown to have then known he had sustained an accidental injury. She knew he was sick, and, when his condition indicated the need, called in her family physician, who recognized the emergency. It is undisputed that from that time immediate and proper action was successfully taken to save the patient's life by a prompt and critical major operation, which it can with some force be contended might have been delayed until too late by sending word to the hospital and waiting for them to investigate and call from Detroit Dr. Mack, who did their complicated surgery work. Broadly considered, the statute as to medical service to be paid for by the employer involves the combined interests of both parties. What services were actually and reasonably necessary to that end, and what is a fair compensation therefor, are the vital inquiries.

Unquestionably that construction of the statute is logical, and the adopted rule sound, which requires notice and opportunity to the employer to select the physician and furnish the needed service during the prescribed three weeks before the injured party can secure the same at the employer's expense, but in the many complications which arise in industrial activities it is not an unreasonable or strained construction of the statute, in view of its purpose, to recognize as inferable exceptions in extraordinary cases where the surrounding circumstances and critical condition of the injured party present emergencies, or exigencies demanding prompt action which reasonably warrant the injured party in securing the then needed service at the employer's expense without first giving notice and opportunity to furnish or offer the same. Such cases are of course, distinctively exceptional and consequently rare. Where such exception is claimed, the question of a pressing necessity demanding and excusing prompt action before reasonable time for notice and opportunity thereafter for the employer to act becomes primarily an issue of fact. There is testimony in this case to support the conclusions of the board in that particular.

The award will therefore stand affirmed.

SUPREME COURT OF MICHIGAN.

SAWTELLS

v.

EKENBERG CO. ET AL. (No. 44.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"EMPLOYEE."

Woman who hauled farmers' milk to the plant of a manufacturer of milk products, controlling her own equipment and actions, and receiving payment from the farmers through the agency of the manufacturer, *held*

*Decision rendered, May 29, 1919. 172 N. W. Rep. 58F.

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an independent contractor, and not an employee of manufacturer, so as to entitle her husband to compensation under the Workmen's Compensation Act for her death.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Certiorari to Industrial Accident Board.

Claim for compensation under the Workmen's Compensation Act by James Sawtells for the death of Lulah Sawtells against the Ekenberg Company, the employer, and the Ætna Life Insurance Company, the insurer. Compensation was denied by the committee on arbitration but awarded by the Industrial Accident Board, and the employer and insurer bring certiorari. Award reversed.

Argued before Bird, C. J., and Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

C. W. & W. S. Foster, of Lansing, for appellant.

George G. Hunter, of Ovid, for appellee.

KUHN, J. Applicant makes the claim for compensation as the dependent of Lulah Sawtells, who died on August 28, 1917, of injuries received on August 8, 1917, by being thrown beneath the wheels of the wagon which she was driving. The committee on arbitration denied compensation. The Industrial Accident Board reversed the award of the committee of arbitration and entered an order allowing compensation. The Ekenberg Company is a manufacturer of milk products and operates plants at Ovid and Elsie, in this state. On and prior to August 8, 1917, Mrs. Sawtells was engaged in hauling milk from farmers and delivering same at the Ovid plant. She furnished her own team, harness and wagon, lived at her own home three miles from Ovid, paid her own blacksmith and repair bills, and otherwise controlled her equipment. She was paid by the hundredweight according to the amount of milk actually delivered at the creamery, which at the time of the accident was 15 cents per hundredweight. This amount was deducted from the milk checks made out to the farmers; the checks expressly stating that the deduction was made for hauling. The money for hauling was paid to her by the company, who had collected it from the farmers, and did not come out of the treasury of the company.

Counsel agree that the sole question for our consideration is whether or not she was at the time of the accident an employee of the Ekenberg Company within the meaning of the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10), or was she an independent contractor? It appears from the testimony that these milk routes for the Ovid plant were frequently bought and sold for money. Mrs. Sawtells bought her route from Mr. Pierce for $60, and after her death her husband sold the route for $50. Mrs. Sawtells had no special arrangement with the company, and was hauling under the same conditions as other haulers. These haulers did errands for neighbors and customers, sometimes for pay and sometimes without. So far as the company was concerned, it was immaterial in what way she moved the milk, and she could, at a profit to herself, solicit and acquire new customers in her own territory. The Industrial Accident Board, after reviewing the case, stated: "In the judgment of the board this is a difficult case." Counsel for the appellant contend that the case should be governed by the decision of this court in Gall v. Detroit Journal Co., 191 Mich. 405, 158 N. W. 36, which presents a case resembling in many of its aspects the facts which are now before us for consideration. In Holbrook v. Olympia Hotel Co., 200 Mich. 597, 166 N. W. 876, it was said:

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"It is often helpful in seeking to determine whether, upon certain facts, the relation of master and servant exists, to consider whether the alleged master would be liable to third persons for misconduct of the alleged servant."

The question of liability for the act of an alleged servant was before us in the Gall Case, supra, and the following excerpt from the opinion in that case is helpful in the consideration of the problem before us:

"Rebtoy was to deliver the papers to such persons, at such places, and on such time as the company should from day to day designate. Such delivery was the result to be obtained. And Rebtoy was to effect such delivery and obtain such result by any means and by any conveyance and in any way he saw fit. He could make the deliveries in person, or through others employed by him. It is shown by the evidence that those making deliveries for the company did occasionally employ others to do the work. He could use a horse, an automobile, or carry the papers on foot, provided he got them to the right persons, at the right places, and upon time. So far as the terms of the contract are concerned, Rebtoy was certainly an independent contractor and not a servant. One whom the employer does not control, and has no right to control, as to the method, or means, by which he produces the result contracted for, is an independent contractor"—citing numerous cases.

The test there stated that, where it does not appear that the employer controls, or has a right to control, the method or means by which the result contracted for is produced, the relationship of an independent contractor is created, when applied to the facts in this case, seems to us to clearly determine that it must be held that Mrs. Sawtells was an independent contractor. It appears conclusively that the company had nothing to do with the means or method by which she brought the milk to the plant. She was using her own equipment, and if she drove spirited horses, such conduct was beyond the control of the defendant. It was her milk route, and she received payment for the work from the farmers through the agency of the company. We think that the situation is clearly distinguishable from other cases on this subject in our reports, and attention might be called to the case of Carleton v. Foundry Co., 199 Mich. 148, 165 N. W. 816, where the previous Michigan cases on this subject are carefully reviewed.

We are of the opinion that the committee on arbitration was correct in denying compensation, and that the award of the Industrial Accident Board should be, and is therefore, hereby reversed.

SUPREME COURT OF MICHIGAN.

WEIDNER

v.

NORTHWAY MOTOR MFG. CO. ET AL. (No. 99.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPLICATION TO INDUSTRIAL BOARD TO REOPEN CASE.

Upon petition before the Industrial Accident Board to reopen a case, it was proper, upon due notice and full opportunity to present testimony, not to limit the hearing to the matter of reopening, but to consider the question of applicant's right to additional compensation.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

*Decision rendered, May 29, 1919. 172 N. W. Rep. 574.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REOPENING CASE—BURDEN OF PROOF.

A servant, who petitions to reopen before the Industrial Accident Board a case closed by his settlement receipt acknowledging payment in full, has burden of showing that he is entitled to reopen the case, and that, not having fully recovered from accidental injury, he is entitled to further payment.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REOPENING CASE BEFORE INDUSTRIAL ACCIDENT BOARD—SETTLEMENT RECEIPT—FRAUD.

In a proceeding by a servant to reopen case before the Industrial Accident Board, servant's allegation of duress, fraud, and misrepresentations, inducing his signing of a settlement receipt, *held* not supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REOPENING CASE— EVIDENCE—SUFFICIENCY.

In a servant's proceeding to reopen a case before the Industrial Accident Board, evidence *held* insufficient to support the board's findings that his injuries were attributable to the accident in question.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Certiroari to Industrial Accident Board.

Proceeding for compensation under the Workmen's Compensation Act by Karl Weidner, opposed by the Northway Motor Manufacturing Company, Division General Motors Corporation, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. Compensation awarded by the Industrial Accident Board, and after full payment and receipt therefor the case was reopened, and from an order for additional compensation the employer and the insurer bring certiorari.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.

Joseph L. Ruby, of Detroit (Carey J. Cole, of Detroit, of counsel), for appellee.

STEERE, J. On January 5, 1918, Karl Weidner, a laborer in the employ of the Northway Motor & Manufacturing Company, sustained an admitted industrial accident, upon the extent and nature of which the parties are not in harmony.

In the usual course of proceedings under the Workmen's Compensation Law (Acts Ex. Sess. 1912, No. 10) the accident was reported to the Industrial Accident Board, an agreement for weekly compensation on the basis prescribed by the act, at $8.64 per week during disability, was entered into, filed with and approved by the board, and all required or desired medical care and attendance furnished the injured employee by the company until February 4, 1918, although Dr. Hall, the company's physician, advised him on January 23, 1918, that he was fully recovered from any effects of the accident and able to resume work. He did not, however, report for work until the fore part of March, 1918, following a final settlement for compensation made with him through the defendant insurance company, by which the prescribed weekly payment for disability was continued and paid from February 16 to March 4, 1918. A settlement receipt in full, for $70.56, in form prescribed by the Accident Board,

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was signed by Weidner and filed with the board. A few days later he reported at the motor company's factory to resume work, where he states they wanted him to run the elevator, and he refused the job, because he was "scart of an elevator," and they said they had other work for him, but they did not give it to him, and he did not try for work elsewhere because he was "too sick." Asked, "What is the matter with you?" he replied:

"I do not feel good on my left side." Q. In any other place? A. It hurts me to stand long, and it hurts me on the right side, but not so much as on the left side."

A written notice to his employer of claim for injury dated April 18, 1918, using the form prescribed for such purpose, states the "nature of the injury" to be:

"Side of body and chest hurt badly, causing dry pleurosis."

On June 13, 1918, plaintiff filed a petition with the Industrial Accident Board "to reopen his case, closed by reason of a settlement receipt filed by the Zurich Insurance Company, insurers, acknowledging settlement and payment in full of all compensation," which he claimed he was not able to read, and was led to believe was the "ordinary receipt used when compensation is paid." The petition states the circumstances of the accident, certain of the prior proceedings in relation to it, that he was "crushed and severely injured internally," and that "he is now suffering from gastroptosis, or the falling of the stomach," and is yet unable to work, although he has employed a number of physicians to treat him. Accompanying his petition is a certificate, dated May 14, 1918, signed by Dr. Witherell, certifying that:

"I have this day made a physical examination of Karl Weidner and find him suffering from gastroptosis."

A hearing was had upon this petition, testimony taken by deposition being submitted by both parties and considered by the Industrial Accident Board, as it returns, for a double purpose—first, to determine whether the case should be reopened; and, having so determined, second, whether further compensation should be awarded. The board decided both inquiries in the affirmative, and without filing any finding of facts or reference to the testimony, beyond the statement that it found as a fact "from all the files and testimony in the case" that as a result of the accident sustained January 5, 1918, plaintiff was unable to resume his occupation or earn wages from the time the settlement receipt was signed, and was therefore entitled to continued compensation at the rate of $8.64 per week in accordance with the terms of the first agreement approved by the board on February 26, 1918. This was ordered paid up to July 3, 1918, forthwith, and paid weekly thereafter.

[1] Defendant's counsel contend in their brief that on the petition filed to reopen the case the testimony submitted by the respective parties was directed and limited to that question only, and the board had no power, without a further hearing upon the second issue, to proceed after reopening the case to a determination of the question whether plaintiff had fully recovered from the effects of his accidental injury and was entitled to additional compensation.

We think that question is disposed of in Curtis v. Slater Const. Co., 194 Mich. 259, 160 N. W. 659, where the same course was followed. and see no objection to the rule of procedure adopted by the board in such cases. There is no occasion for multiplying pleadings or duplicating proofs, if all parties are given ample notice and opportunity to present such evidence as they desire. The major question which is germane to the entire inquiry is whether the applicant is entitled to further compensation because of disability resulting from an industrial accident. In this case ample opportunity and time were given both parties to take and present such testimony as they desired. The application was filed with the board

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June 15, 1918. On July 8, 1918, the first depositions were taken for plaintiff, consisting of his own testimony and that of Dr. Witherell. On July 19, 1918, defendant took the depositions of Dr. Hall and Dr. Panzner. On August 5, 1918, the deposition of Dr. Benmosche was taken at the instance of plaintiff. Each time counsel for the respective parties stipulated as to the method and participated in the examination.

[2, 3] The employer's report of the accident and injury, made to the board shortly after the accident as required by the statute, states as follows:

"While he was in the elevator with operator and load of motors, injured claims elevator fell 1½ floors, causing motor to fall, and as he tried to stop it he injured himself. Muscle strain of back; possible comminuted fracture lumbar vertebræ."

Plaintiff similarly described the accident in his testimony, and says he "rolled the trucks away and then crawled out on the second floor." He admitted he resumed work and remained until quitting time; the foreman telling him to use the next elevator. His only description of his injuries or feelings at that time is:

"I asked the foreman to go home, because I felt weak, and my heart went blump, blump; but he said that they were too busy, and that I should continue my work until quitting time. I did so."

He did not resume work at defendant's plant thereafter, and it is not questioned that he sustained injuries which incapacitated him for a time; the accident being reported and his incapacity recognized as related.

Dr. Hall, the company's consulting surgeon, and his assistants, cared for plaintiff professionally and rendered him such medical care and services as he required. His complaint then was of pain in his back and lower part of his lungs. Dr. Hall testified that he saw plaintiff both at the plant and his office down town, and made three careful physical examinations of him, the first on January 18; that he found him a very well-nourished, robust man, could not discover any abrasions, discolorations, or other physical injuries, or pain symptoms, but, knowing he had been considerably shaken up in the accident, of which he gave an account, and pain itself not being visible, he accepted his word that he suffered pain for the fact, and treated him accordingly, seeing him from time to time up to February 4; that he examined him on January 23, could find no evidence of any disability, and, considering him entirely recovered from any injury, reported him able to go to work.

Plaintiff's further medical history comes from three physicians of his own selection, whose offices he visited after declining to accept the elevator job, and secured their services to treat or examine him. The first was Dr. Panzner, to whom he went on March 15, 1918, complaining of a pain in the lower part of his chest. Dr. Panzner diagnosed the cause of the pain as a localized dry pleurisy in the lower left part of the chest, involving a small area of probably two or three inches. He testified that plaintiff gave a history of the injury, and, as he was complaining of pain in his chest, an X-ray picture was taken of both sides, and no fracture was found, nor any diseased condition of the lung or heart; that he appeared to be healthy, and everything was found normal, except that he discovered in the front lower part of the left chest what he called "friction ralls," or a "kind of respiration which has been found in conditions of dry pleurisy," and so made that diagnosis, for which they applied adhesive plasters and gave him some internal medicine; that plaintiff called about half a dozen times within the ensuing month, during which he was under their care, and says:

"After a week or two, then, this pleuritic condition disappeared, so that at the end of that time we considered him a cured man."

Dr. Panzner, the only physician who discovered dry pleurisy, not only states it was eliminated within a month, and plaintiff a cured man, but,

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as there was no fracture, old or otherwise, to traumatize the pleura, "it couldn't be due to any injury."

Dr. Witherell, who furnished the certificate accompanying plaintiff's petition to reopen the case, testified to examining him twice, found no dry pleurosis, but did find a condition of "gastroptosis, or an enlargement and downward displacement of the stomach," which he said was a gradual development, and might be caused by "overeating, indigestion, heavy lifting, and a dozen things would cause it." He refused to state or express an opinion that the gastroptosis he diagnosed was traceable to the accident of January 5, 1918. The nearest to an opinion of any answers pointed out or found are:

"Q. Do you think that the abnormal condition of this man's stomach is caused by injury? A. Yes. * * * Q. Would the fall of a heavy body against the stomach of a person cause gastroptosis? A. It may or may not."

But even this was negatived by other answers as follows:

"Q. And from your examination are you willing to say that this condition resulted from an injury? A. I could not say it did. Q. What would you say would cause the injuries complained of by Mr. Weidner? A. I do not know."

In answer to a hypothetical question by plaintiff's counsel, based on certain facts in the history of the case, in connection with his physical examination, he replied:

"No; I cannot state that the condition I found was the result of the accident at all."

Dr. Benmosche testified that plaintiff had come to him for treatment about three weeks before; that he took several X-ray pictures, and his findings were:

"That his stomach is about normal, slightly enlarged, no ulcerations, ptosis of the transverse colon, * * * and a shadow in the region of the gall bladder, which is due to some dense body in the gall bladder.

"Q. Did you find any gastroptosis? A. Very slight, if any—not a pathological ptosis."

He also stated that he found the transverse colon "toast," or "fallen lower," which was not at all uncommon. In answer to the question of whether the pressure of a heavy body, or between 300 and 400 pounds, would tend to intensify the conditions he found, he answered that it might. On cross-examination he said he did not wish to be understood that this condition of the bowel was the result of an accident.

This proceeding is an application by plaintiff to reopen a case which he states was closed by a settlement receipt which he signed, acknowledging payment in full. Upon him rested the burden of proof to show, both that he was entitled to have his case reopened and that, not having recovered fully from the accidental injury, he is entitled to further payment. While he alleges in his application that he signed the settlement receipt under a misapprehension as to what he was signing, the testimony is silent on that subject. He does not so testify, nor that any duress, fraud, or misrepresentation was practiced upon him, by any one at the time, or that it was not then read to him. Even accepting as proof the allegations in his petition, the situation, except the statement he could not read English, is closely analogous to that in Winn v. Adjustable Table Co., 193 Mich. 128, 159 N. W. 373, an industrial aceident case, in which this court said:

"It is not shown that any deceit was practiced by the agent of the insurance company in obtaining the agreement for compensation. Claimant says that he supposed it was a receipt when he signed it, but that he did not ask to have it read, nor did he read it himself, although he was competent to do so. Under these circumstances he will not be heard to

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deny the validity of the agreement. Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371. But such an agreement may undoubtedly be reviewed by the Industrial Accident Board, upon a proper showing, under section 13, pt. 3, of the act."

[4] The only specific injuries resulting from the accident ever claimed by plaintiff in his notice of claim to defendant or his petition to the board are dry pleurosis and gastroptosis. The first is affirmatively eliminated by the testimony of Dr. Panzner, the only one of the physicians who discovered it. Dr. Witherell, who testified to gastroptosis, which he said was a gradual development, and might be caused by more than a dozen different things, refused to testify that it was caused by, or to venture the opinion it was traceable to, the accident. Dr. Benmosche stated he found plaintiff's stomach normal, though slightly enlarged, and did not want to be understood that the not uncommon falling of the colon which he noticed resulted from the accident. Considered in its most favorable light, plaintiff's proof furnishes no legal evidence to support the finding of the board that his injuries, or infirmities, which plaintiff claimed and sought to prove resulted from or were attributable to the accident in question.

The order appealed from is therefore reversed.

SUPREME COURT OF MICHIGAN.

ZOLADTZ ET AL.

v.

DETROIT AUTO SPECIALTY CO. ET AL. (No. 89.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE.

In compensation proceedings for death of a metal polisher employed by an automobile specialty company, *held* that there was some evidence the accident arose out of and in the course of the servant's employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD TO MOTHER WITH PROVISION FOR CHILDREN ON HER DEATH.

Under Comp. Laws 1915, § 5436, particularly subdivision "c," award of compensation for death of a husband and father, made by the Industrial Accident Board to the wife, with provision that should her death occur before it was all paid any unpaid balance should be paid to any of the minor children surviving, in equal shares, *held* proper.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Proceedings for compensation under the Workmen's Compensation Act for the death of Peter Zoladtz, the employee, by Mary Zoladtz and others, opposed by the Detroit Auto Specialty Company, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, in-

*Decision rendered, May 29, 1919. 172 N. W. Rep. 549.

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surer. Compensation was awarded by the Industrial Accident Board, and the employer and insurer bring certiorari. Affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Stere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.
Edward Pokorny, of Detroit, for appellees.

MOORE, J. Mary Zoladtz is the widow of Peter Zoladtz. The other claimants are his small children. Mr. Zoladtz was at work for the defendant as a metal polisher, and received injuries which resulted in his death. The Accident Board awarded to Mrs. Zoladtz $7.79 per week for a period of 300 weeks from the date of the death of her husband, and in case of her death before all the compensation payable in the case has been paid, the unpaid compensation shall be paid to the other claimants then living, in equal shares. This is certiorari to review the award of the Accident Board.

[1] The first assignment of error is:

"The Industrial Accident Board erred in ruling that the personal injury sustained by Peter Zolad 'arose out of and in the course of his employment."

This assignment is based upon the contention that Mr. Zoladtz was disobeying instructions when he was hurt. This was sought to be shown by the testimony of the foreman. This testimony was received over the objection that it was against the statute, as Mr. Zoladtz could not give his version of the conversation. We think the testimony was incompetent. Hanna v. Steel Castings Co., 204 Mich. 139, 170 N. W. 6. With this testimony eliminated, it is not shown that Mr. Zoladtz was violating any instruction or any rule to which his attention had been called.

We quote from the testimony:

"Q. Do you know a fellow up there by the name of Charlie; he is a machinist. A. The one that puts on belts? Q. Yes. A. Yes.

"Q. How many times have you seen Charlie put on the belt? A. After that accident I saw him that he put on the belt two times.

"Q. Who is Charlie up there? What does he do? A. He is the man that when a drill breaks on the machine he takes it over on an electric drill—I take it and he repairs it. If any belt breaks it is taken to him, and he repairs the belt.

"Q. Has he got a room there where he works? A. Yes; he works in the basement. Q. Ever been down there? A. Yes, I was there a couple of times.

"Q. Did anybody say anything to you with reference to what you should do if your machine broke? A. No; I took the drill myself down, and he fixed it.

"Q. How do you know where to take it? A. The man that used to work with me, Steve, he told me where to bring it.

"Q. You take it down to Charlie because somebody told you to take it there; is that right? A. Yes.

"Q. And when the belt broke you took that down to Charlie? A. Yes.

"Q. That was Charlie's job, wasn't it? A. Sure, Charlie's work.

"Q. When anything broke there in the shop they took it to Charlie; is that right? A. Yes. * * *

"Q. Did you see Peter trying to put the belt on the wheel? A. Yes.

"Q. Just tell us what you saw him do; what did you see Peter do? A. The first thing the afternoon he started to work, in the afternoon.

"Q. On the polishing machine? A. On the polishing machine. He went to put the belt on, the belt broke, and dropped on the floor.

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"Q. Between 1 and 2 o'clock? A. Between 1 and 2 o'clock, something like that, I couldn't tell for sure.

"Q. Where? A. After that he go—

"Q. He took the belt to Charlie? A. He went to the cellar.

"Q. All right.

"Mr. Lacey: He went to the cellar, you said? A. Yes, I don't know for sure what he got there for.

"Q. Did you see him when he came back? A. Yes; he came back.

"Q. Was the belt fixed when he came back? A. The belt fixed.

"Q. The belt was fixed? A. Yes. Q. Did Peter have the belt with him when he came back from the cellar? A. He came back with the—

"Q. With the belt? A. He hold it in his own hands.

"Q. You mean the belt was in his hands? A. Yes.

"Q. Then what did you see Peter try to do? A. After that he put that belt in the machine with a piece of board. I don't know how he figured with the piece of board.

"Q. What was he trying to do? A. It was about four inches long.

"Q. How wide? A. About an inch.

"Q. Thick? A. Yes.

"Q. Now stand up and just show us what was Peter doing with the board? A. Well he took the board, and put—he wanted to put the belt on the wheel on that pulley. After the pulley—must be the pulley—must be the spokes, then he get the pulley here, and that stick, when the stick hit Peter right here (indicating).

"Q. You mean in the stomach? A. Yes."

[2] We do not think it can be said that there is no testimony that the accident did not arise out of and in the course of the employment of Mr. Zoladtz. See Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; Papinaw v. Railway Co., 189 Mich. 441, 155 N. W. 545; Vogeley v. Detroit Lumber Co., 196 Mich. 516, 162 N. W. 975; Hanna v. Michigan Steel Castings Co., 204 Mich. 139, 170 N. W. 6.

[3] Appellant's second assignment of error is as follows:

"The Industrial Accident Board erred in the entry of its order in which they held that compensation should be paid to Mary Zoladtz 'at the rate of $7.79 per week for a period of 300 weeks from and after May 10, 1917, but said award is hereby modified and amended so as to provide that in case of the death of Mary Zoladtz before all the compensation payable in this case shall have been paid, then and in such case all unpaid compensation shall be paid to the said above-mentioned children, or to any of them who are then living, in equal shares."

In the return of the Industrial Accident Board is the following:

"The proof shows that the deceased left four children, the issue of himself and the applicant, whose names and ages are as follows: Nellie Jones Zoladtz, aged 12 years; George Jones Zoladtz, aged 7 years; Stanilaus Zoladtz, aged 4 years, Joe Zoladtz, aged 17 months. These four children were just as dependent upon the deceased as their mother was. By agreement of the attorneys for the respective parties the title of this case was amended so as to make the children as well as their mother applicants. The compensation will be paid to the mother, but should her death occur before it is all paid any unpaid balance will be paid to any of the above-named children then surviving in equal shares."

Upon this record the award as made cannot be disturbed. See section 5436, C. L. for 1915, and especially subdivision "c."

The award is affirmed, with costs to the appellee.

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SUPREME COURT OF MINNESOTA.

STATE EX REL. GREAT NORTHERN EXPRESS CO.

v.

DISTRICT COURT OF RAMSEY COUNTY. (No. 21230.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CARRIER BY STEAM RAILROAD—EVIDENCE.

Action to recover under the Workmen's Compensation Act (Gen. St. 1913, c. 84a). Evidence considered, and *held,* that the defendant is a common carrier of express, but not a common carrier by steam railway.

(For other cases, See Master and Servant, Dec. Dig. 405(2).)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF AND IN COURSE OF THE EMPLOYMENT—EVIDENCE.

Evidence considered, and *held,* that the defendant company, as well as the deceased, was, at the time of the accident in question, subject to the Workmen's Compensation Act, and that the accident arose out of and within the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405 [2, 4].)

Appeal from District Court, Ramsey County; Hugo O. Hanft, Judge.

Certiorari by the State, on the relation of the Great Northern Express Company against the District Court of Ramsey County, to review its findings and judgment for plaintiff in action under the Workmen's Compensation Act, to recover for death of Matthew C. Kelly, her husband, while in relator's employ. Affirmed.

M. L. Countryman and A. L. Janes, both of St. Paul (E. C. Lindley and F. G. Dorety, both of St. Paul, of counsel), for appellant.

Lyle Pettijohn, of St. Paul, for respondent.

QUINN, J. Action under the Minnesota Workmen's Compensation Act, to recover for the death of plaintiff's husband, caused while in the employ of the defendant. The trial court made findings, and ordered judgment for the plaintiff in the sum of $2,050. Judgment was so entered. The cause comes to this court by certiorari for review.

[1] Two questions are presented:

(1) Is the defendant exempted from the application of the Compensation Act by virtue of chapter 193 of the Session Laws of 1915, providing that the act shall not apply to "any carrier by steam railroad"?

(2) Was the death of plaintiff's decedent due to an accident arising out of and in the course of his employment within the meaning of the Compensation Act?

The defendant, Great Northern Express Company, is a Minnesota corporation. It is a common carrier of express throughout this and other of the states. It operates largely, but not exclusively, over the lines of the Great Northern Railway Company, which operates its trains by steam. Defendant owns no interest in such railway, nor has in any manner to do with its operation, or that of any other railroad. It merely pays the railway company for carrying its express parcels. The Great Northern

*Decision rendered, May 16, 1919. 172 N. W. Rep. 310. (Syllabus by the Court.)

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Railway Company owns the capital stock of the defendant, but the employes are answerable in their employment to the defendant and not to the railway company.

At and for some time prior to his death, which occurred on October 9, 1917, Matthew C. Kelly, plaintiff's husband, was in the employ of the defendant express company as a warehouseman at a salary of $18 per week. Defendant's general office building where Kelly usually worked is at the corner of Third and Broadway streets in the city of St. Paul, and its warehouse is situated some two blocks distant therefrom, near the yards of the Union Depot. There were toilet accommodations in the general office building, but there were none in the warehouse in which deceased was sent to work in sorting express, and the distance between the two buildings was such as to render it impossible for an employe at the warehouse to reach the toilet in case of an exigency. On the day of the accident decedent had been handling express at the general office building. Shortly before the accident he was directed to go to the warehouse and there assist in sorting express packages which were to be sent by the defendant to points outside the state over the Great Northern Railway Company's lines. While at the warehouse in the course of his employment, deceased had occasion to use a toilet, and sought, as a matter of necessity, shelter under a freight car standing on a side track some 30 feet distant from the warehouse. The car was moved, and he was killed instantly. Although the place to which deceased resorted was an unsafe one, the trial court found that he was not guilty of willful negligence.

It is contended that neither the defendant company nor the deceased was subject to the Workmen's Compensation Act at the time of the accident; that the defendant was owned by the Great Northern Railway Company; that it operated over the lines of that and other steam railways; that it paid a certain per cent. of its revenue for its railway service, and therefore was a common carrier by steam railroad, and exempt from the operation of the act.

Under the original Compensation Act (section 8202, G. S. 1913), the only common carriers exempted from its operation were those subject to federal legislation. By chapter 193 of the Laws of 1915, section 8202 was amended so as to provide that, "This act shall not be construed or held to apply to any common carrier by steam railroad." Gen. St. Supp. 1917 § 8202. It is clear that the defendant Express Company is a common carrier, but it neither owns nor operates a railroad of any kind. Its employes are not subject to the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. §§ 8657-8665). It has exclusive control over its employes. In transacting business it avails itself of the various railroads in its territory as a means of shipping express, paying stated rates therefor. We do not think it can be said that the appellant is, within the meaning of the law, a common carrier by railroad. Higgins v. Erie Ry. Co. et al., 89 N. J. Law, 629, 99 Atl. 98. Evidently the legislative purpose of the amendment was to prescribe a rule exempting carriers having to do with the operation of railroads by steam. We hold that the defendant was within and subject to the provisions of the act.

[2] We have no doubt but that the trial court was fully justified, under the showing, in finding that the accident arose out of and within the course of the employment. It occurred during working hours. There were no toilet accommodations within two blocks. Decedent was of necessity compelled to attend to his call. Defendant was negligent in not providing accommodations in the warehouse. The necessity of the decedent's immediately retiring to some available place, coupled with the absence of accommodations in the warehouse, gave rise to the danger. The case is not without precedent. Newark Pav. Co. v. Klotz, 85 N. J. Law, 432, 91 Atl. 91; Jarvis v. Hitch (Ind.) 65 N. E. 608; State v. District Court, 129 Minn. 176, 151 N. W. 912; State v. District Court, 129 Minn. 502, 153 N. W. 119.

Judgment affirmed.

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SUPREME COURT OF MINNESOTA.

STATE EX REL. RINKER

v.

DISTRICT COURT OF PENNINGTON COUNTY, FOURTEENTH JUDICIAL DIST. ET AL. (No. 21345.)*

MASTER AND SERVANT—WITNESSES—WORKMEN'S COMPENSATION ACT—FINDINGS—REVIEW.

The finding that the evidence fails to prove that relator's husband came to his death as the result of an accident arising out of and in the course of his employment must be regarded as in effect a finding that he did not die from such cause. The evidence is such that the finding cannot be set aside under the rule announced in State ex rel. Niessen v. District Court, 172 N. W. 133.

(For other cases, see Master and Servant, Dec. Dig. §§ 412; 410½, New vol. 7A Key-No. Series.)

The statement made to relator by her deceased husband as to the cause of his sudden illness was rightly excluded.

The testimony as to the condition a doctor, called to attend the deceased, found him in a few months prior to his last illness, seems to bear so little upon the vital issue in the case that the error in its reception should not reverse the judgment.

Appeal from District Court, Pennington County; Andrew Grindeland, Judge.

Certiorari by State of Minnesota, on relation of Elizabeth A. Rinker, against the District Court of Pennington County, Fourteenth Judicial District, and others, to review a judgment rendered in favor of the Hanson-Barzen Milling Company in a workman's compensation proceeding to recover for death of relator's husband, Adolph H. Rinker, deceased. Affirmed.

L. S. Ogden and Mead & Bryngelson, all of Minneapolis, for appellant.

L. N. Foster, of Minneapolis, and E. M. Stanton, of Thief River Falls, for respondent.

HOLT, J. Certiorari to review a judgment rendered in favor of the defendant in a workman's compensation proceeding.

Relator's husband, Adolph H. Rinker, a man 52 years old, was head miller for the Hanson-Barzen Milling Company at the time of his death, December 29, 1916. In the forenoon of December 26th, he and another man replaced the windows in the mill, removed some days before so as to freeze the flour bugs that had become troublesome. He also moved, on a two-wheel truck, a couple of rollers from the platform or door to a place 20 feet inside of the mill. These rollers were crated and weighed nearly 500 pounds. They were lifted from the ground to the platform. The evidence does not show how this was accomplished. Only one of the three persons who worked with Rinker that day was called to the witness stand. He was called by relator, and testified that Rinker did not help lift the crates to the platform; and that the only thing Rinker

*Decision rendered, May 16, 1919. 172 N. W. Rep. 311. Syllabus by the Court.

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did was to move them with the truck, two men assisting by tilting the crates so that Rinker could easily shove the nose of the truck under. Between 11 and 12 o'clock Rinker put on his overcoat and went home. On reaching home he looked stunned, pale, and nervous, according to relator's testimony. She was not permitted to state what he said. He stayed home that afternoon, at times lying down. He did not rest well during the night. The next morning about 9 o'clock he went to the mill, but returned within two hours looking pale and exhausted. He telephoned for Dr. Heiber, who came and attended him. He continued nervous and restless, and at times showed distressed breathing. He was unable to remain in the same position any length of time, frequently changing, now lying down, now sitting or walking. At 5 o'clock on the 29th he collapsed suddenly, and just as the doctor arrived. The death certificate gave acute dilatation of the heart as the cause. There is some dispute whether the attending physician added the words, "caused by violent exercise," which now appears in red ink upon the certificate filed with the board of health. In April, 1917, relator caused a post mortem to be made upon the body, which had been kept in the vault of the cemetery. This was done without notice or opportunity to defendant to be present. The physicians who made the post mortem gave acute dilatation of the heart as the cause of death, and said that the muscles or tissues of the heart had given way or ruptured. They also expressed the opinion that this could have been brought about by great exertion or strain, a few days before the actual collapse came. The relator testified that prior to December 26th her husband had always enjoyed good health. In this she was corroborated by neighbors. He had worked for the milling company for upwards of 10 years.

The chief attack is upon this vital finding viz.:

"That the evidence fails to prove that said Adolph H. Rinker came to his death as the result of an accident arising out of or in the course of the deceased workman's employment."

Before compensation could be awarded, relator must establish the very fact which the court finds the evidence fails to prove. The finding is not as direct as might be desired, but must be taken to be of the same effect as if it had stated that Rinker's death was not the result of an accident arising out of or in the course of the employment. How, on certiorari, the findings in proceedings under the Workmen's Compensation Act (Gen. St. 1913, c. 84a) are to be treated by this court was considered and determined in State ex rel. Niessen v. District Court, 172 N. W. 133 (filed May 2, 1919). The findings are not conclusive, but are here reviewed for the purpose of determining whether they are supported by sufficient competent evidence. And the rule guiding us is that if an impartial consideration of the evidence together with all reasonable and fair inferences will lead reasonable minds to but one conclusion, and that conclusion is the opposite of the one made by the trial court, the finding should be set aside. If the record so shows, we have a case where this court may say an error of law permeates the judgment necessitating a reversal.

Tested by this rule, the finding mentioned must be sustained. It is true, acute dilatation of the heart is an "accident" within the definition of the Compensation Act, in that it produces at the time "injury to the physical structure of the body," the muscles of the heart being ruptured. It is also often "an unexpected or unforeseen event, happening suddenly and violently." Section 8230, G. S. 1913, subd. h. We have stated the facts and testimony which are favorable to the contentions of relator, and to that we may add that Mr. Farr testified that Mr. Rinker came to the witness' soft drink parlor, in the forenoon of some day near Christmas, and said he did not feel good and inquired for a bottle of beer or brandy, and in the conversation remarked that he got hurt, but did not say how, where, or when.

On the other hand, inferences tending to sustain the learned trial

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court's finding may be drawn from the fact that the one man who worked with Mr. Rinker both in replacing the windows and moving the rollers testified that nothing occurred of a nature to produce a strain, nor was there overexertion, or violent exercise on the part of Mr. Rinker; that a 12-year-old boy could easily do the trucking Rinker did; that only about 10 windows were replaced; and that the work involved no particular effort. Furthermore, Mr. Rinker complained neither to this companion, nor to Mr. Barzen, an officer of the milling company whom he saw on the 27th, of any hurt received in his work. Mr. Barzen said that when Rinker returned to the mill that morning he stated that—

"After a nice night's rest and a good breakfast he started for the mill and felt fine until reaching the top of the hill, when he developed further pain in his chest."

If something in the course of his work had happened to make this previously strong and healthy man call his doctor and experience the condition he related to his employer, not to mention the conditions described by relator, we should expect him to refer to it. The officers of the company deny that in the telephone communications, or in any other talk, relator, or the doctor, ever stated anything concerning Mr. Rinker's receiving a strain or hurt in his work. The court below could also give credence to the opinion Dr. Gambell gave, that had acute dilatation, or rupture of the heart muscles, occurred during his work, Rinker would have collapsed at once. There are sudden deaths of apparently robust persons from what is commonly called heart failures where previous premonitions are as insignificant as here, and where no primary contributing cause can be assigned except by way of conjecture. Shortly before Mr. Rinker expired he was sitting up playing solitaire. The doctor who was called on the 27th of December thought a few days' rest would restore Rinker to his usual health. In the absence of any testimony pointing to something in the work which Mr. Rinker was doing on the 26th, or previously, as an adequate cause for the rupture of the heart muscles and consequent death, we see no way by which, under the rule stated, the finding mentioned should be held by us perverse or unsustained.

Relator relies upon Puhlmann v. Brown Co. District Court, 137 Minn. 30, 162 N. W. 678, and Simmers v. Stearns Co. District Court, 137 Minn. 318, 163 N. W. 667. The cases are similar in that the injury was to some internal organ, a blood vessel, and might have been caused by some strain in the work. But in both cases the court below found in favor of the dependents, and this court sustained the findings. It is quite a different proposition to reverse the findings. We may add, also, that in both the evidence as to the connection between the ruptured or affected organ and the strain of the work of the employe was much more palpable than in the instant case.

The court did not err in excluding what Mr. Rinker stated to his wife concerning the cause of his not feeling well, when he returned from the mill. She comes clearly within the statute, prohibiting persons interested to give conversations had with one since deceased.

It was error to admit the testimony of what Dr. Gambell found when called to treat Mr. Rinker, some months before his death. But we do not see how the testimony received could have influenced the court in any degree on the finding here questioned. And the learned trial attorney for relator seems to place little faith in a reversal upon that ground.

We are constrained to affirm the judgment.

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SUPREME COURT OF MINNESOTA.

STATE EX REL. NELSON

v.

DISTRICT COURT OF WABASHA COUNTY ET AL. (No. 21460)*

MASTER AND SERVANT—PROCEEDING UNDER WORKMEN'S COMPENSATION ACT—CHANGE OF VENUE.

Insurer's proceeding in Wabasha county to determine amount recoverable by insured's employee for accidental injury in course of employment in that county, though employe resided in Hennepin county and insurer and employer were foreign corporations, would not be transferred to that county on employe's order to show cause, as Workmen's Compensation Act (Gen. St. 1913, §§ 8216, 8225, and section 8230, subd. "m"), do not provide for change of venue, and as change of venue statutes do not apply to proceedings under such act.

(For other cases, See Master and servant, Dec. Dig. § 396.)

Mandamus by the State, on the relation of John Nelson, against the judge and clerk of the District Court of Wabasha County, to require transfer of a proceeding under the Workmen's Compensation Act to the District Court of Hennepin county. Order to show cause discharged.

Erling Swenson, of Minneapolis, for relator.
Granger & Clemens, for respondent.

PER CURIAM. Order to show cause why mandamus should not issue directing respondents, the judge of the district court of Wabasha county and the clerk of said court, to transfer to the district court of Hennepin county a proceeding, under the Workmen's Compensation Act, instituted in said Wabasha county by the insurer of relator's employer to determine the amount he was entitled to recover on account of an accidental injury received by him in the course of the employment. The accident happened in Wabasha county. Relator, the servant injured, resided and still resides in Hennepin county. The employer, as well as the insurer of the employer, are foreign corporations. The complaint was served April 1, 1919, and the matter set for hearing for May 12th. On April 15th relator served an affidavit for change of venue to Hennepin county and filed proper proof. The respondent clerk refused to transfer the cause, and on the day set for the hearing relator appeared specially, and objected to the jurisdiction of the court, and demanded that the proceeding be transferred to Hennepin county.

The proceeding under the Workmen's Compensation Act is designed to be speedy and summary. No provision for a change of venue is contained therein. Section 8216, Gen. St. 1913, provides that in case of dispute as to the amount of compensation either party may submit the claim "to the judge of the district court of the county which would have jurisdiction in a civil case." Section 8225 specifies the procedure in case of dispute; a complaint must first be presented to the judge for fixing the place and time for hearing, and then the complaint is to be "filed with the clerk of the district court of the proper county." Section 8230, subd. "m":

"'The court,' as used herein, shall mean the district court which

*Decision rendered, May 29, 1919. 172 N. W. Rep. 486.

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would have jurisdiction in an ordinary civil case involving a claim for the injuries or death in question."

The complaint is to be served within four days after filed, and the answer shall be filed within seven days after the service of the complaint. The provisions for a change of venue do not fit in with the procedure under this act. We think there is good reason for not making the change of venue statute applicable, where it was intended to give a speedy adjustment. Furthermore, proceedings of this kind are begun by presenting the complaint to a district judge. It is fair to presume that the judge will not fix the place of hearing so as to make the attendance an unnecessary hardship for either party. That change of venue statutes have no application to workmen's compensation proceedings was virtually decided in State ex rel. v. District Court of St. Louis county, 129 Minn. 423, 152 N. W. 838.

The order to show cause is discharged.

SUPREME COURT OF NEBRASKA.

MORRIS & CO.

v.

CUSHING. (No. 20677)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW —INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Action under the Workmen's Compensation Law, as amended by chapter 85, Laws 1917. Under the facts set forth in the opinion, ***held,*** that the accident complained of arose out of and in the course of the workman's employment.

(For other cases, See Master and Servant, Dec. Dig. § 375(1).)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Douglas County; Day, Judge.

Action by Michael Francis Cushing, a minor, against Morris & Co. for compensation under the Workmen's Compensation Law, after denial of application for compensation. From an award of compensation Morris & Co., termed plaintiff, prosecuted an appeal to the district court, and from a judgment for the employe, termed defendant, Morris & Co. appeals. Affirmed.

James C. Kinsler, of Omaha, for appellant.

T. A. Donahoe and M. L. Donovan, of Omaha, for appellee.

MORRISSEY, C. J. Action under sections 3642-3696, Rev. St. 1913, as amended by chapter 85, Laws 1917, known as the "Workmen's Compensation Law."

Michael Francis Cushing, a boy of 16, while employed as a common laborer in and about the packing plant of Morris & Co. suffered the loss

*Decision rendered, May 3, 1919. 172 N. W. Rep. 691. Syllabus by the Court.

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of four fingers. He made application for compensation under the statute. The employer denied liability, whereupon Cushing filed a petition with the compensation commissioner, as provided in section 15, c. 85, Laws 1917. On hearing, the compensation commissioner awarded the employe compensation at the rate of $10 per week for 100 weeks. Morris & Co. instituted this proceeding, which is in the nature of an appeal from the order of the compensation commissioner, in the district court. Under the peculiar provisions of the statute the titles of the parties are transposed, Morris & Co. being designated as plaintiff and Cushing being designated as defendant. From a judgment in favor of defendant, Morris & Co. has prosecuted an appeal to this court, where the parties retain the same titles they had in the district court.

The employment and the injury are admitted. There is no complaint as to the amount awarded, provided defendant is entitled to any award. Plaintiff alleges, however, that Cushing had departed from the line and scope of his employment, and that his accident was not one arising out of and in the course of his employment.

In April, 1917, Cushing was employed by one of plaintiff's foremen, who, when a witness for plaintiff, gave the boy's duties as follows:

"His duties were to carry the boards from the saw, and carry boards from the printing press, and when there would not be any work of that kind to do he was supposed to truck boxes to the various departments and handle lumber and sweep up the floor, in fact, do anything in the line of common labor around the shop."

The boy continued in this line of employment until the day of the injury. On that morning he was directed to assist in unloading a car of lumber that was to be used in the box department where the boy worked. He remained during the forenoon at that task. In the noon hour he ate his luncheon in the box factory. When the hour arrived for the men to resume work, he was met by a laborer from the cooper's shop, who said he would like to have defendant cut some hoops for him. Defendant consented to do this work, and testifies:

"I thought if he needed the hoops and wanted to get the barrels out right away, I would saw them."

He took a coil of hoops, went into the box factory where he was generally employed, and began to cut the hoops with a hatchet. While he was thus employed, Mr. McCleary, the foreman in the oleomargarine department, came into the room and stated that he wanted a box. There is some discrepancy in the testimony of defendant, the foreman, and the elevator operator, who was present, but it appears that this foreman made it known that he needed a box, and inquired if he could have one made. The elevator operator testifies that he suggested that defendant might make one; that defendant consented, and began work on the box. During defendant's employment, a considerable portion of his time had been taken up in carting boxes away from a circular saw, which was in use in the factory, and generally operated by a "straw boss" named Altman. Defendant now undertook to operate this saw in order to prepare boards for the box. While thus engaged, his hand came in contact with the saw, and he suffered the injury for which recovery is sought.

Plaintiff contends that defendant was not acting within the scope of his employment in undertaking to make the boxes; that he had no right to undertake the operation of the saw; and that had he followed the instructions of his foreman he would then have been engaged in unloading lumber from the car. Defendant testifies that on one or two other occasions he had used the saw under instructions from Altman, and his testimony in this respect is not disputed. The record shows that he was subject to the orders of different foremen. These several foremen may have differed in rank, but defendant had during his employment taken orders from each of them. He was only a boy of immature years. As shown by the testimony quoted of the foreman who employed him, it was

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his duty to "do anything in the line of common labor around the shop." This being true, he cannot be held to the strict accountability of his acts. Accustomed as he was to take orders first from one foreman and then from another, when the foreman of the oleomargarine department signified his desire that defendant make a box, he might well assume that it was his duty to obey, and that that order countermanded the order given by the other foreman earlier in the day to assist in unloading the car of lumber. It is clear that he was engaged about the premises where his services required his presence, during proper hours of service, and that his labor was calculated to promote the master's business. He had theretofore used the saw under the eye, if not under the direction, of his immediate foreman, Altman, and at the time the accident occurred he was carrying out the order, implied, if not directly expressed, of one of plaintiff's foremen, who stood watching him as he worked.

The evidence sustains the finding of the district court, and the judgment is affirmed.

Cornish and Sedgwick, JJ., not sitting.

COURT OF APPEALS OF NEW YORK.

PHONVILLE

v.

NEW YORK & CUBA S. S. CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION.

An employe earning $35.09 a week, who has lost three-fourths of his right hand, is entitled as compensation to $20 a week for 183 weeks, and not to $15 a week for 244 weeks, since the extent of the employee's injuries limits, not the amount of payments, but the time during which they are to continue.

(For other casses, See Master and Servant, Dec. Dig. § 385(12).

2. MASTER AND SERVANT WORKMEN'S COMPENSATION—COMPENSATION.

Permanent loss of the use of the hand, arm, foot, leg, or eye is equivalent to the loss of the organ itself.

(For other cases, See Master and Servant, Dec. Dig. § 385(11).

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings under the Workmen's Compensation Law (Consol. Laws, c. 67) by William E. Phonville for compensation for injuries, opposed by the New York & Cuba Steamship Company, employer, and the Travelers' Insurance Company, insurance carrier. From an order of the Appellate Division (173 N. Y. Supp. 919) modifying, and as modified unanimously affirming, an award by the State Industrial Commission, the employer and insurance carrier appeal. Order of Appellate Division reversed, and award of State Industrial Commission affirmed.

See, also, 174 N. Y. Supp. 917.

*Decision rendered. April 22, 1919. 123 N. E. Rep. 258.

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E. C Sherwood, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. [1, 2] The Industrial Commission has found that the claimant has lost the use of 75 per cent. of his right hand. His weekly wages being $35.09, it awarded him $20 a week for 183 weeks Unanimously approving the findings of fact, the Appellate Division altered this award to $15 a week for 244 weeks. In this it erred. The act fixes but one rate of compensation for injuries. The workman is to receive two-thirds of his weekly wages, not exceeding a certain sum. The extent of his injuries limits, not the amount of these payments, but the time during which they are to continue. If for the loss of a hand that time is 244 weeks, for the loss of three-fourths of the hand it is 183 weeks. The weekly compensation for the loss of a hand, arm, foot, leg, or eye is not to exceed $20 a week. Permanent loss of the use of any such member is equivalent to the loss. The same measure applies to it. In other cases $15 is the limit. In 1917 an award was authorized for the proportionate loss of the use of a hand. Clearly the compensation for such proportionate loss is intended to be some fraction of the amount allowed for the total loss. The weekly limit is $20, not $15.

Because of the unanimous affirmance no other questions need be considered by us.

The order of the Appellate Division should be reversed, and the award of the state Industrial Commission affirmed, but without costs.

Hiscock, C. J., and Chase, Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

Order reversed, etc.

COURT OF APPEALS OF NEW YORK.

STEWART

v.

KNICKERBOCKER ICE CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—VALIDITY.

In view of the amendment to Judicial Code, § 24 (U. S. Comp. St. §§ 991[1] to 991[25]), which saves from the jurisdiction of the federal courts to claimants the rights and remedies under Workmen's Compensation Law of any state, the Workmen's Compensation Law of New York, in so far as it gives a remedy for injuries or death of an employe engaged in work of a maritime nature, is not in violation of the federal Constitution, conferring jurisdiction on the federal courts in admiralty cases.

(For other cases, See Master and Servant,Dec. Dig. § 347.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of Lillian E. Stewart, for compensation for the death of William M. Stewart under the Workmen's Compensation Law, against the Knickerbocker Ice Company, employer. An award of the State Industrial Commission was affirmed by the Appellate Division (173 N. Y. Supp. 924), and the employer appeals. Affirmed.

*Decision rendered, Apri 29, 1919. 123 N. E. Rep. 382.

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Frank R. Savide, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HISCOCK, C. J. This is an appeal from an affirmance of an award made under the Workmen's Compensation Act (Consol. Laws, c. 67) for injuries received by one Stewart, while engaged in helping to unrig a derrick on one of the defendant's barges. It is conceded that the work in which the injured man was engaged was of a maritime nature, and upon that conceded fact the argument is made that our Workmen's Compensation Act is not applicable, because it is in conflict with the Constitution of the United States and with the federal statute passed thereunder. The attempt is made to support this argument almost exclusively by reference to the decision of the United States Supreme Court in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The Jensen Case was one involving the applicability of our Workmen's Compensation Act to injuries received by a stevedore while engaged in helping to unload a vessel belonging to the Southern Pacific Railroad Company. The two questions which were considered by Judge Miller in his opinion (215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276) were the ones whether our act was unconstitutional, as depriving employers of property without due process of law; and, second, whether it was in conflict with the federal Constitution, because attempting directly to regulate or impose a tax or burden on interstate or foreign commerce—the Southern Pacific Company, owner of the vessel, being concededly engaged in such commerce. He reached the conclusion, concurred in by all members of the court voting, that the act was not vulnerable in either of those respects. When the case reached the Supreme Court, however, a new question was argued, and it was held by a closely divided vote that, inasmuch as the injured man was engaged in maritime work, our Compensation Act was violative of the United States Constitution as embodied in the federal statutes adopted thereunder conferring jurisdiction in such a case upon the federal courts.

In the prevailing opinion it was, amongst other things, in substance, written that the Constitution extended the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and conferred upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof" (244 U. S. 214, 37 Sup. Ct. 528, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900); that under these provisions of section 9 of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 77) the District Courts of the United States had been given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it" (244 U. S. 215, 37 Sup. Ct. 529, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900), and that this grant had been continued under Judicial Code, §§ 24 and 256 (Act March 3, 1911, c. 231, 36 Stat. 1091-1094, 1160 [U. S. Comp. St. §§ 991 (1) to 991 (25), 1233]); that the remedy given by our compensation statute was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and therefore not saved to suitors from the grant of exclusive jurisdiction under the foregoing statute. Proceeding upon these fundamental principles, it was held that our act was in conflict with the Constitution as expressed in these statutes.

It was, however, recognized in the prevailing opinion that the general maritime law under which jurisdiction was reserved to the federal courts might be changed, modified, or affected by state legislation, and that it was impossible to define with exactness just how far this might be done.

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The limitation which was placed upon this power was defined in the general proposition that "no such legislation [by the state affecting maritime jurisdiction] is valid, if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U. S. 216, 37 Sup. Ct. 529, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The enactment by the states of Workmen's Compensation Acts has become very general. Public sentiment has justified and demanded the enactment of these statutes, as offering speedy and simple relief to injured workmen and their dependents, and as being a positive and decided step in the interest of industrial welfare and of better relations between employers and employes. In recognition of this widespread public sentiment, and realizing it is desirable that the states should be given power to enact and administer such statutes as these, the Congress, since the decision of the Jensen Case, has very materially modified the federal statute under which it was held that our decision in the latter case could not stand. It has amended this statute, so that it now saves from the jurisdiction of the federal courts "to suitors in all cases the right of a common-law remedy when the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state."

In view of the close division of opinion amongst the learned justices of the Supreme Court, involved in the decision of the Jensen Case, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of the federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the Constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of maritime employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional.

The order should be affirmed, with costs.

Chase, Hogan, Cardozo, Pound, McLaughlin, and Andrews, J.J., concur

Order affirmed.

COURT OF APPEALS OF NEW YORK.

COMBES

v.

GEIBEL ET AL.

IN RE STATE INDUSTRIAL COMMISSION.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACT—NOTICE OF INJURY—EXCUSE FOR FAILURE TO GIVE.

State Industrial Commission's finding that failure to give notice of injury within the time required by Workmen's Compensation Law § 18 did not prejudice the employer or insurance carrier cannot be sustained,

*Decision rendered, April 29, 1919. 123 N. E. Rep. 452.

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where no reason was shown why notice could not have been given and award of compensation under section 16 will be reversed.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings under Workmen's Compensation Act by Maria E. Combes, opposed by Henry Geibel, employer, and Bakers Mutual Insurance Company of New York, insurance carrier. From an order of the Appellate Division affirming awards by the State Industrial Commission (173 N. Y. Supp. 903), the employer and insurance carrier appeal. Order reversed, awards annulled and claims dismissed.

Charles E. Scribner, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent State Industrial Commission.

CHASE, J. The industrial commission found that—

"On or about December 13, 1916, the day when Charles Combes sustained his injury, he * * * was employed as a stableman in the livery and boarding stable, operated by the employer."

Also that—

"Charles Combes in connection with the duties of his employment was rolling out certain cans containing manure, and while so doing he accidentally slipped on the ice and snow on the sidewalk, and one of these cans fell upon him and crushed his left hand on to the sidewalk. As the result of this crushing, an infection set in which necessitated the amputation of three fingers."

Also that—

"At the time of the said injury Charles Combes was 65 years of age and was then suffering an acute dilatation of the heart. The injury which he sustained on or about December 13, 1916, and the consequent infection and amputation of the fingers lowered the vitality of the claimant and caused the aggravation and lighting up of other conditions which he suffered, as the result of which he died on February 3, 1917, of chronic interstitial nephritis and the complicating condition which generally accompanies this condition, namely, pulmonary œdema. The disability and death of Charles Combes were therefore caused by said accidental injury."

And also—

"Written notice of the injury to the claimant and of his death was not given to the employer, respectively, within 10 days after disability and 30 days after his death, but neither the insurance carrier nor the employer was prejudiced by such failure."

The findings were made as a part of the decision and two awards based thereon; one upon a claim for compensation for disability filed by the employee January 25, 1917, and the other upon a further claim for death benefits under the statute (Workmen's Compensation Law, § 16), filed March 26, 1917, by the employee's surviving wife. The decision of the commission was not unanimous. One of the commissioners dissented. An appeal was taken from the awards to the Appellate Division of the Supreme Court, where they were affirmed by a divided vote of the court. Matter of Combes v. Geibel, 173 N. Y. Supp. 903.

We will assume, without deciding, that there is some evidence to sustain the findings of an injury to the employee, and that his death was caused by such injury. We do not think that there is any evidence to sustain the finding that "neither the insurance carrier nor the employer was prejudiced" by the failure to give the notices required by the statute.

The statute as it existed in 1916 and 1917 provided as follows:

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"Sec. 18 *Notice of Injury.*—Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing. * * * The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter." Workmen's Compensation Law (Cons. Laws, c. 67) § 18.

There was no reason why notices could not have been given in this case. No pretense was made of obeying the statute quoted. Not only did the claimants fail to give the notices as provided by the statute, but no written notice of the injury or death was given to any one at any time except the claim dated January 25, 1917, that we have mentioned, and a notice by letter to the employer from the employee's wife, saying that her husband had his fingers cut in his place, and that "he (the employee) had stated by a notary public that he was hurt," and in which letter she asked the employer to look after compensation. That letter must have been written after January 25, 1917. The employer testified that in response to that letter he went to see the employee, and was told by him or by his wife that he hurt his finger on a can while working in the stable. The employee died the next day.

While the employer knew that the employee had a sore finger, he testified without contradiction that he saw the finger when the employee first commenced working for him, either late in November or early in December, and that it was then red and swollen, and that to some extent it incapacitated the employee in his work. There is no evidence of a verbal notice of the injury having been given to the commission or the employer until after January 25, 1917, and immediately before the employee's death, and no evidence of knowledge, except as stated, on the part of either that the employee claimed to have been injured on December 13th, or at any time when employed at the stable.

The findings from which we have quoted, including the statement that neither the insurance carrier nor the employer was prejudiced by the failure to give the notices required by the statute, and the ruling of the commissioners excusing the failure to give such notice "on the ground that such failure did not prejudice the employer or the insurance carrier," are not sustained by any evidence whatever.

This court in Matter of Bloomfield v. November, 219 N. Y. 374, 376, 114 N. E. 805, 806, say:

"The Legislature, however, has deemed it proper and essential under ordinary circumstances that a written notice of disability and claim should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice." Matter of Bloomfield v. November, 223 N. Y. 265, 119 N. E. 705; Matter of Hynes v. Pullman Co., 223 N. Y. 342, 119 N. E. 706, Ann. Cas. 1918C, 1040.

The burden rests upon the claimant who has been guilty of the default to excuse the same. Matter of Bloomfield v. November, supra; Matter of Hynes v. Pullman Co., supra.

If the employee was injured on December 13th, as he claims, by having his finger pinched by one of the cans that he was handling, it was a mere aggravation of a prior injury or inflamed condition of the same finger. He thereafter applied home remedies, and continued at his employment with some intermissions until December 26th, when he went to a physician. At that time the physician found that the employee was suffering from heart trouble, that he had Bright's disease, "which must

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have existed some time," and that the finger was in a gangrenous condition, and that the infection ran halfway up his forearm. Subsequently he amputated first one finger and later two more fingers. The amputations were successful, but his other troubles grew worse, and he died as stated.

If the notices had been given as required by the statute, or even if knowledge of the alleged injury had been obtained in some other way at or about the time it is claimed that the injury occurred, there would have been an opportunity not only for a prompt general investigation of the alleged circumstances of the accident but of the employee's story thereof and there could have been an examination of the injured finger, and such care and attention could have been given to it as to have prevented infection or, if infection was not so prevented, then the facts relating to it could have been obtained from which it could have been better determined whether the infection was the result of causes other than the alleged injury. There can be no reasonable doubt that without the statutory notices or proof of knowledge of the injury and claim, the employer and insurance carrier were prejudiced.

The order of the Appellate Division should be reversed and the awards of the Industrial Commission annulled, and the claims dismissed, with costs in this court and in the Appellate Division payable by the Industrial Commission.

Hiscock, C. J., and Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

Order reversed, etc.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

CULHANE

v.

ECONOMICAL GARAGE CO. ET. AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACT—SCOPE OF EMPLOYMENT.

Where a garage employee, having entered the office at his foreman's invitation to view a revolver found in an automobile, was killed by accidental discharge of weapon while it was handed to him by foreman, foreman and deceased were not then acting in employer's interest, so as to support an award under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from State Industrial Commission.

Claim of Mrs. Nora Culhane for compensation for herself and children under the Workmen's Compensation Law (Consol. Laws, c. 67) on account of the death of William F. Culhane, against the Economical Garage Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. From an award of the State Industrial Commission in favor of claimant, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

*Decision rendered, May 20, 1919. 176 N. Y. Supp. 508.

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Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

COCHRANE, J. The employer operated a public garage. The employee was employed to wash automobiles. The commission has made findings as follows:

"On October 18, 1918, William F. Culhane was working for his employer at his employer's plant. While engaged in the regular course of his employment, he was directed by the foreman in charge of the garage to examine an automatic revolver which had been found in one of the automobiles. While obeying the order of his superior, and while holding out his hand to receive the pistol, and while the pistol was still in the possession of the foreman, it accidentally discharged, and a bullet therefrom entered the chest of William F. Culhane, causing his death 10 minutes later."

The foregoing findings are entirely unsupported by the evidence. Day was the foreman in charge of the garage, having authority to give orders to the deceased in connection with the business. From this fact it has been assumed that whatever he said to Culhane was an order exacting from him obedience. The revolver that caused the fatal accident was in an automobile which was taken to the garage. At the request of the chauffeur the revolver was taken from the automobile by Day, the foreman, and placed in a desk in the office for safe-keeping. That was about 2 o'clock in the afternoon. It appears from the evidence that thereafter Day had no duties in respect to the revolver until such time as it might be called for by the chauffeur or owner of the car. The accident occurred after 11 o'clock. The only testimony in the case as to how it happened was given by Day, and is as follows:

"Q. And when next did you see the pistol? A. When I called my friend in to show it to him. * * * Q. Did you have anything to do with that pistol as far as your work was concerned? A. Nothing at all —only just happened to pull open the drawer, and I called Will in to show it to him. Q. Will is Mr. Culhane? A. Mr. Culhane; yes. Q. Where was he when you called him in? A. He was coming in the door of the garage after being out to his supper; he had supper right in the garage, and he went out to have a glass of beer after supper. Q. It was the door between the main part of the garage and the office? A. Yes, sir; a big wicker door. Q. What did you say to him, and what did he say to you? A. I heard him and John Rhine coming in, and I says, 'Come in here, Bill, want to show you a pistol I took out of the Massachusetts car to-day; and he took it and put it against his shoulder and says, 'That's a nice one—let's look at it'; and and I was just about to lay it onto his hand when she went off—it was just about slipping off of my hand onto his. * * * Q. You had general supervision over him —told him what he must do? A. I didn't tell him what he must do. I just asked him to come in and look at the pistol."

It clearly appears, therefore, that Day was not acting in his capacity as foreman when he asked the deceased to enter the office for the purpose of looking at the revolver. That was not a command, but an invitation. The deceased was under no obligation to comply. For his refusal to do so he could not have been lawfully discharged. Had Day invited Culhane to go across the street to examine the revolver, and the accident had there occurred, it certainly could not be said that either man was engaged in the performance of a duty he owed his employer. The case

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does not differ materially because the accident happened on the premises of the employer. Or if the two men had been engaged in a game of cards in the office, and while thus engaged the accident had occurred, the case would not be materially different. In either of the supposed cases both men would have been engaged outside of their duty. The two men were gratifying their curiosity in respect to the revolver and were doing nothing to further the interest of their employer. In Matter of Saenger v. Locke, 220 N. Y 556, 116 N. E. 367, L. R. A. 1918F, 225, it was said:

"The injury must be received as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work."

Such is not the case here. The respondent cites the case of Matter of Laurino v. Donovan, 186 App. Div. 387, 173 N. Y. Supp. 619. The distinction between that case and this is sufficiently indicated by a single sentence from the opinion:

"He was engaged in the discharge of his duties when the explosion occurred."

In the instant case neither Day nor Culhane was so engaged. They had both temporarily departed therefrom to serve a purpose of their own.

In Matter of Di Salvio v. Menihan Co., 225 N. Y. 123, 121 N. E. 766, the injured employee crossed the room in which he was working to say good-by to a fellow employee who had been drafted into the military service, and while doing so was injured by machinery. The court said:

"There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow employee. This act did not enable him, either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties, or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer's interests. It was simply and solely the expression of a private desire and the consummation of a personal purpose."

The circumstance that Day was the foreman of Culhane does not affect the situation. Day was not acting in the discharge of his duties as foreman, or carrying forward the interests of his employer, but with Culhane was engaged in the consummation of a purpose personal to each of them. Culhane was not obeying an order of Day in any proper view of the occurrence. To draw such an inference as that the occurrence must be warped out of its true significance.

The award should be reversed, and the claim dismissed. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

FISCHER

v.

GENESSEE CONST. CO. *et al.**

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ANNULMENT OF AWARD.

Annulment of award by State Industrial Commission, under Workmen's Compensation Law, §§ 22, 74, where based upon opinions of physicians constituting no part of the record at any hearing, written after hearing was closed, and without knowledge of claimant, or opportunity to cross-examine or be heard with reference thereto, was error.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW—ASSENT TO AWARD.

Insurance carrier, which assented to award by admitting injury was cause of accident, will not be permitted a review upon appeal.

(For other cases, see Master and Servnat, Dec. Dig. § 419.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ANNULMENT OF AWARD.

Industrial Commission's power to change award under Workmen's Compensation Law, §§ 22, 74, is not an arbitrary one, but a judicial discretion, to be exercised only in the interest of justice, and upon new evidence that counsel for commission was deceived, overreached, or acted upon a clear mistake of fact; cumulative evidence bearing negatively upon question of fact already amply proved being insufficient, in view of sections 21 and 23.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ANNULMENT OF AWARD.

Where annulment of award was based upon opinions as to cause of injury, made after close of hearing, by physicians who had not examined employee and were misinformed as to facts, and upon application of insurance carrier, who had admitted upon hearing that injury was cause of accident, the annulment was arbitrary, and not authorized by Workmen's Compensation Law, §§ 22, 74, in view of sections 21 and 23.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—LIABILITY OF STATE INSURANCE FUND.

Liability of State Insurance Fund is in all respects the same as any other insurance carrier, and is established by like proof.

(For other cases, see Master and Servant,Dec Dig. § 405[1].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Charles Fischer for compensation for injuries, oppposed by the Genesee Construc-

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*Decision rendered, May 7, 1919. 176 N. Y. Supp. 86.

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tion Company, employer, and the State Insurance Fund, insurance carrier. From a decision of the State Industrial Commission, annulling award and dismissing claim, claimant appeals. Reversed, and award reinstated.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

C. D. Kiehel, of Rochester, for appellant.
Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C Aiken, Deputy Atty. Gen., of counsel), for Commission.

KELLOGG, P. J. An award was duly made October 8-11, 1917, and, upon a motion to reopen, was duly affirmed, Januarv 14, 1918, and several payments were made thereon. It was well sustained by the reports of the employer, the employee, and Dr. Schuhart, who treated the arm, and by the testimony of Dr. Snell, the oculist who treated the eye, and the testimony of Dr. Levy and Dr. Gelser for the State Fund. The claimant was present, without counsel, but was not called as a witness. An adjournment was had for a week, to enable the Fund to have the claimant examined by a physician, but upon the adjourned day counsel for the Fund stated "that the general opinion seems to be that the loss of the eye is due to the accident," and the record shows that no further testimony was introduced, "largely due to the fact that the representatives of the State Fund, the physician who examined him, and those familiar with the case were of the opinion that the claimant had sustained a systemic septicæmia as the result of the injury to the hand, and that caused the iritis, and subsequent loss of use of the right eye."

[1] April 22, 1918, by the order under review, the commission annulled the award and dismissed the claim. Its decision is based upon the written opinions of two physicians. One of the opinions was written after the hearing was closed, and neither opinion seems to have been made a part of the record at any hearing, and the claimant apparently had no knowledge of them, and no chance to cross-examine or to be heard with reference to them. This practice did not give him the fair hearing contemplated by the statute, and the order should therefore be reversed. Matter of Hayes v. Communipaw Steel Co., —— App. Div. ——, 176 N. Y. Supp. ——, decided at the March term of this court.

The award was final and conclusive against the State Fund, no appeal having been taken. Section 23, Workmen's Compensation Law (Consol. Laws, c. 67). Nevertheless the commission had continuing jurisdiction over the case, with power to change its determination as justice may require Section 74. The presumption raised by section 21, and the provisions of section 23, prevent an interference with the award on the facts, unless there is substantial evidence of a mistake which, in the interest of justice, compelled such action. Sections 22 and 74 must be given a broad and liberal interpretation, and, as circumstances arise, must be held to cover cases which we cannot in advance anticipate. They are intended to remedy an apparent injustice.

[2, 3] The State Fund so far assented to this award that it would not be permitted a review upon appeal. Cunningham v. Buffalo Copper & Brass Rolling Mills, 171 App. Div. 955, 956, 155 N. Y. Supp. 797. Neither, upon its application, should the commission annul the award, except upon new evidence clearly showing its injustice and that the counsel for the commission was deceived, overreached, or acted upon a clear mistake of fact. The mere fact that cumulative evidence has been found, which might bear negatively upon a question of fact already amply proved and understandingly conceded, is not in itself a basis for annuling the award. Public policy requires that there should be a reasonable end to litigation, and that issues once fairly tried and stipulated, with full knowledge of the facts, should not be disturbed, except for some com-

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pelling reason, in order to prevent a miscarriage of justice or a manifest wrong. The power to change an award is not an arbitrary one, but a judicial discretion, to be exercised only in the interest of justice. The award was a property right, which cannot be destroyed unless it definitely appears that, as a matter of justice, it should not stand.

[4, 5] We may profitably consider whether there is any substantial evidence against the award and whether justice requires its annulment. The decision under review is so out of harmony with the uniform decisions of the commission in like cases against other insurance carriers that it evidently rests upon a mistake of law or fact. See Caine v. Greenhut & Co., 13 State Dept. Rep. 515; Id., 181 App. Div. 907, 167 N. Y. Supp. 1091; Abelson v. Steinway & Sons and Travelers' Insurance Co., —— App. Div. ——, 175 N. Y. Supp. 893, affirmed at this term of court. The liability of the State Fund is in all respects the same as that of any other insurance carrier, and is established by like proof. That rule is so well understood that we conclude that the commission relied too much upon the statements and conclusions found in the expert opinions. It is evident that the physicians were misinformed as to the facts, or did not fully appreciate them. The opinions, if they had been properly received in evidence, would form no substantial basis for annuling the award. Neither physician had examined the claimant. In fact, one physician, called by the Fund at the hearing, had examined him, and gave evidence favorable to him. Another examined the claimant at the request of the Fund, and it was stated at the hearing that he concluded that the loss of the eye resulted from the injury to the hand.

The opinions upon which the decision under review was made are not based upon the facts of the case. Each opinion, in substance, assumes that the claimant was not sick, and that the trouble with the eye developed in the case of a well man. The evidence shows that, immediately after the accident, the hand and arm to the armpit became very much swollen, inflamed, red, and tender, and that while the swelling was at its worst the deposit of infectious matter, concededly from within, lodged at the eye, and that claimant lost thirty pounds in weight in about three months, was unable to work, was not feeling well at all, was complaining of his hand and of rheumatic pains; that he had attempted to do two or three things and could not do them, and, about seven months after the accident, was still disabled from headaches and dizzy spells, together with poor vision. The claimant was not sworn and was without counsel. The commission made such inquiry as to it seemed best, and it did not inquire of him as to the symptoms or the extent or nature of his illness. Apparently the physicians who wrote the opinions desired no further information upon those subjects. One of the opinions rests upon the statement that the claimant had abscesses of teeth, and that the attending physician had sworn that the claimant was entirely well at the time he first treated the eye. The physician swore to the contrary, and there is no statement outside of the opinion of any "abscesses in teeth." The other opinion also was based upon the apparent assumption that the trouble at the eye developed in a well man, and the improbability of such an occurrence. It assumes that there was a diseased tooth. Both opinions practically assume that there was no infectious pus, arising from the injured hand, absorbed into the blood, entirely overlooking the facts that the employer concedes that pus was forming in the hand and arm, that there was no puncture of the skin for its escape, and that the "bad tooth" spoken of by the doctor who examined the claimant had been extracted at an early time, and that the source of infection evidently remained for a long time thereafter, and that none of the physicians who examined the claimant connected the bad tooth with the loss of the eye. The doctors who saw the claimant had no doubt that infectious matter from the bruised hand was absorbed into the blood and caused the loss of the eye. The physicians called by the Fund on the hearing confirmed that theory.

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The ex parte opinions referred to doubt the existence of septicæmia, because the claimant was not sick enough to indicate its existence, and because the attending physician, who was dead at the time of the inquiry, in filling up the blank form prepared by the commission, did not give the symptoms from which he determined that there was septicæmia, but made the general statement that there was septicæmia, from which the loss of the eye resulted. Neither opinion attempts to account for or to explain the known symptoms. The opinions are not in harmony with the decisions of the commission and of this court. The assumed facts were not the facts of this case, and therefore the opinions were not a sufficient basis for a determination that the interests of justice required the award to be vacated and the claim dismissed. If, in any event, the award was not to stand, justice required a rehearing.

The decision under review is arbitrary, and is not fairly within the spirit of sections 22 and 74 of the Workmen's Compensation Law. The order should be reversed, and the award reinstated, without prejudice to a regular proceeding for a rehearing, if desired. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

IN RE BEHRENS.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION FINDING—DUTY TO MAKE.

Under Workmen's Compensation Law, § 20, as amended by Laws 1917, c. 705, and section 23, the commission need not formulate findings, except in cases which are appealed.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—OPENING PROCEEDINGS AFTER APPEAL—POWER OF INDUSTRIAL COMMISSION.

State Industrial Commission has power after appeal to open proceedings and receive further testimony, and when this is done the commission should make and file another award or decision, and appeal should be taken therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 417 [4½].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL—IRREGULARITIES—WHO MAY QUESTION.

Though no notice of filing of an award was given, and notice that award had been made contained no copy of award, where appeal was taken from award thus made, the Industrial Commission cannot complain of its own omission.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¾].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL—DETERMINATION.

Where testimony taken on reconsideration after appeal from first award of Industrial Commission has no bearing on pivotal point in the

*Decision rendered, May 7, 1919. 176 N. Y. Supp. 28.

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case, the appeal from the first award will be considered, though there is no appeal from award made on reconsideration.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEEDS—LIMITATIONS.

Compensation for injury resulting in contraction and inability to extend the second and third fingers of hand, with consequent interference with functions of hand and remaining fingers, is not limited to 55 weeks for loss of second and third fingers, under Workmen's Compensation Laws, § 15, subd. 3, but may be awarded under that part of said subdivision regulating "other cases."

(For other cases, see Master and Servant, Dec Dig. § 385[4].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—BASIS.

In awarding compensation under Workmen's Compensation Law, § 15, subd. 3, for injuries resulting in contraction and inability to extend second and third fingers of hand, with consequent interference with functions of hand and remaining fingers, commission should determine wage-earning capacity of claimant, and not base award on actual wages received since the accident.

(For other cases, see Master and Servant, Dec. Dig. § 385[2].)

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law by George A. Behrens, opposed by the R. F. Stevens Company, employer, and the Standard Accident Insurance Company, insurer. Award in favor of claimant, and employer and insurer appeal. Award reversed, and proceedings remitted to the Commission.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Neile F. Towner, of Albany, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

COCHRANE, J. Confusion has arisen, growing out of the practice on appeals under the Workmen's Compensation Law (Consol. Laws, c. 67). It is claimed by the Attorney General that the appeal in this case has not been properly taken. For the purpose of clarifying the practice and obviating mistakes we are calling attention to the requirements of the statute relative to appeals. Sections 20 and 23.

[1] When the commission makes a decision, it is required to file the same in its office, and immediately after such filing "send to the parties a copy of the decision" (section 20), with "notice of the filing of the award or the decision" (section 23). Within 30 days after such notice the appeal must be taken. Since the amendment to section 20 of Laws of 1917, chapter 705, the decision need not contain a statement of the conclusions of fact and rulings of law by the commission. But where an appeal is taken "the commission shall within thirty days thereafter serve upon the parties in interest a statement of its conclusions of fact and rulings of law" (section 23). The purpose of the statute plainly is to relieve the commission from the necessity of formulating findings except in cases which are appealed.

[2] Undoubtedly the commission has power after an appeal to open the proceedings and receive further testimony. When it does so, it should make and file another award or decision, and send a copy thereof,

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with notice of the filing, to the parties, and an appeal should be taken from such subsequent award or decision, so as to bring up the entire record. In the present case the commission has not followed these plain requirements of the statute, and is primarily responsible for whatever confusion exists. The record shows that it made an award to the claimant September 26, 1918, for a period terminating September 27, 1918. On the following day it sent to the parties a notice stating that an award had been made, but containing no copy thereof. No notice of filing the award was given.

[3, 4] The appellants, however, appealed from the award thus made and the commission cannot complain of its own omissions. Subsequently, and on November 18, 1918, the case was reconsidered, and on November 20, 1918, the commission sent to the parties a communication that "the action of the commission was to affirm the award previously made to September 27, 1918." The decision of November 18, 1918, is not in the record, nor was any copy thereof or notice of filing thereof sent to the appellants, nor have the appellants appealed therefrom. But inasmuch as no testimony was taken on November 18, 1918, bearing on what we regarded as the pivotal point in the case we think we may consider the appeal from the award of September 26, 1918. The statement of the conclusions of fact and rulings of law was properly made after the service of the notice of appeal (section 23).

[5, 6] The claimant was injured October 27, 1916. The injury has resulted in the contraction and inability to extend the second and third fingers of the right hand with consequent interference with the function of the hand and remaining fingers. Seven awards have been made from time to time, all of which have been paid, except the last award, covering the period from August 6, 1918, to September 27, 1918, from which this appeal is taken. The compensation paid covers a period of 91 weeks. We cannot agree with the contention of the appellants that compensation is limited to 55 weeks for the loss of a second and third finger under subdivision 3 of section 15. The injury affects the use of the hand and the remaining fingers, and we agree with the commission that under the statute as it was at the time of this accident compensation may be awarded under that part of subdivision 3 of section 15 regulating "other cases." Matter of Sugg v. Erie Railroad Company, 180 App. Div. 133, 167 N. Y. Supp. 390; Matter of Supple v. Erie Railroad Company, 180 App. Div. 135, 167 N. Y. Supp. 391. But even on this theory the award is wrong. It is 66⅔ per centum of the average weekly wages of the claimant before the accident. The claimant earned nothing during the period covered by the award, but the statute in such a case makes the compensation not 66⅔ per centum of the difference between his former and subsequent wages, but 66⅔ per centum of the difference between his former average weekly wages and "his wage-earning capacity thereafter in the same employment or otherwise." He may have had a "wage-earning capacity" during the period covered by this award. That period was nearly 2 years after the accident. Within 2 weeks after the award he was working. Perhaps he was able to do so at the time of the award. No testimony was taken on this point, and the award is unsupported. The commission should determine the wage-earning capacity of the claimant, and not base the award alone on actual wages received since the accident.

The award should be reversed, and the proceeding remitted to the commission. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

IN RE VISSAGGIO.

IN RE NEW YORK CONSOL. R. CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVERSIBLE ERROR—MISCONDUCT OF DEPUTY COMMISSIONER.

The use of sarcasm, insinuations, sneers, ridicule, and intimidation by deputy commissioner, while conducting investigation and examining witnesses, manifesting bias and prejudice against employer, requires reversal of award, in view of Workmen's Compensation Law, § 65, as to award of deputy needing only approval of commission, and section 20, as to right to present evidence and be represented by counsel.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from State Industrial Commission.

Proceedings for compensation under the Workmen's Compensation Law, by Theresa Vissaggio, claimant, against the New York Consolidated Railroad Company, employer and self-insurer. From awards of the State Industrial Commission in favor of claimant, the Railroad Company appeals. Awards reversed, and proceedings remitted to commission for another hearing.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

George D. Yeomans, of Brooklyn (Harold L. Warner, of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

COCHRANE, J. This award must be reversed because of the misconduct of the deputy commissioner who conducted the investigation. The claimant was employed to clean car windows. The alleged accident was the fall of a window on her left little finger, causing subsequent infection. The defense was that the infection was caused by a brass ring worn by her, which scratched or injured a pimple on her finger. The claimant testified she never had a ring on that finger. She further testified that two women were working with her at the time of the accident These women were called as witnesses by Mr. Isaacsen, the attorney of the appellant. One of the women testified that the claimant had a pimple on her little finger; that she had a brass ring on the finger, which started the blood poisoning. She was then subjected to a searching and exhaustive cross-examination by the deputy commissioner, in the course of which the record discloses the following, the questions being asked by him:

"Q. What kind of a ring was it? A. A little brass ring. Q. You have been watching that ring? You have seen the ring a hundred times on her? A. I never watched it. Q. How many times did you see it? A. Once or twice I noticed it. Q. You know the ring. Describe the ring. A. I cannot describe it. She had a ring on her finger. Q. How

*Decision rendered, May 7, 1919. 176 N. Y. Supp 109.

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do you know it wasn't a piece of wire? A. She told me. It was a little ring. Q. Was it like a piece of wire? A. No wire—a little bit of a ring. Q. 'A little bit of a ring.' What do you mean? A woman knows all about rings. I am not talking to a man. They are fond of jewelry. You know what kind of a ring it was, if you know at all. A. A little bit of a ring. She told me it was brass herself Q. What kind of a ring was it? Was it a ring like that (shows ring on his finger). A. No, sir. Q. Did she ever show it to you and say, 'Look at my ring?' A. She never showed it to me like that. She was working and I noticed it on her finger. We are always busy working on subway cars.

"Commissioner Curtis: You evidently worked a whole lot, from what you say, if she told you all her business.

"The Witness: We never talk about rings. She told me the ring scratched that pimple.

"Commissioner Curtis: You just testified that she told you all about her business.

"The Witness: Not about the rings.

"Commissioner Curtis: You first said she told you all about it, and you told me the reason why she told you—she told you all her business, and that's how you know. Is that what you said?

"The Witness: We don't talk about rings. She told me the ring scratched her pimple.

"By Commissioner Curtis: 'Q. You are sure of that part? A. Yes, sir. Q. What makes you so sure? A. I am sure of that. Q. Why? A. Because she told me. Q. Who was talking to you to make it so fresh in your memory that she told you about this ring? Did she tell you about her home affairs? A. Sometimes. * * * Q. When did she tell you that the ring scratched her finger? A. She told me some time while working together. Q. When? A. I can't remember the date; the 17th she first complained about her finger. Q. The 17th of August? A. Something like that. Q. Who told you the 17th? Where did you get this information? You are unable to remember any other date, only the 17th. That has been instilled in you very thoroughly. How is it you know the 17th? A. I didn't know it would be a case of it. * * * Q. Do you remember the date she told you she was injured? A. The 17th.

"Commissioner Curtis: God! You will stick by the 17th. You have it solid in your memory.

"Witness: Yes, sir.

Commissioner Curtis: You don't know anything about anything else. * * * Q. You never saw a window fall on the subway cars? A. No, sir. They cannot fall.

"Commissioner Curtis: Then you haven't had the same experience I have.

"Mr. Isaacsen: On the Brooklyn Rapid Transit?

"Commissioner Curtis: Are they different?

"Mr. Isaacsen: Very much different.

"Commissioner Curtis: That's one good thing that the B. R. T. has—the windows don't drop. * * * Q. Did you ever have any trouble with this woman? A. No, sir; always friendly, but once sweeping—

"Commissioner Curtis (interrupting, addressing Interpreter Vioni): Ask her did she ever have an argument?

"The Claimant: In one week I made $18.60, and this woman was jealous because I made more than they did.

"Commissioner Curtis: I thought there was something."

At the conclusion of the testimony of this witness she was dismissed, with this comment by the deputy commissioner:

"She knows all about the B. R. T.—only the schedule; nobody knows that."

The other woman who was present at the time of the alleged accident was then called as a witness and testified to an admission by the

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claimant that her finger was hurt by the ring. In the course of her testimony she stated that the claimant had not asked her to testify in her behalf. This bit of testimony being somewhat favorable to the claimant drew from the deputy commissioner the comment: "You are telling the truth." He then took the witness in hand, and his examination not developing from her responses in each instance favorable to the claimant, he apparently changed his views about the veracity of the witness, as his subsequent comments indicate. In the course of a lengthy examination conducted by the deputy commissioner in the same spirit as characterized the examination of the former witness the following occurred:

"This woman says on the 17th you cleaned them. A. She has better dates than I have.

"Commissioner Curtis: Maybe she has reas a to have better dates. She has the injury. Maybe if you had the injury you would have better dates. * * * Q. You had some trouble with her? A. She wanted to do the clean work, and wanted us to do the dirty work. Q. you had a little spat with her every day. A. Not exactly. Q. There was always a feeling between you that she wasn't doing thos or that A. Not a bad feeling.

"Commissioner Curtis: Not very bad.

"Mi. Isaacsen: I submit that she said 'no bad feeling between us.' You said 'Not very bad.' I don't believe you should put words in her mouth.

"Commissioner Curtis: She has been very well schooled. Even in testifying she is not holding to her own story, because she doesn't know whether she cleaned windows on that day or not. From the start she has shown there is a feeling between the two women.

"Mr. Isaacsen: I don't think you can show any prejudice—

"Commissioner Curtis (interrupting): She stated here that this woman wanted her to do the dirty work. * * * Q. What was the size of the ring., in your opinion? You are a woman that knows about the wedding rings used these days. Was it the size of the wedding ring used to-day as a rule A. There was the hand right her (indicating)—Q. (interrupting): Was it gold or brass? A. I think it must be mixed.

"Commissioner Curtis: You are a little better.

"Mr. Isaacsen: She is not a jeweler. How does she know? She is testifying to the best of her knowledge.

"Commissioner Curtis: Then you are acknowledging that your other witness didn't know."

The claimant had been treated by a nurse in the employ of the appellant. A discussion arose at the hearing, as to whether the nurse should be produced. It seemed to be the understanding of the attorney for the appellant that she was not at that time in the employ of the appellant. The attorney, after stating that the nurse did not witness the accident, announced that he would rest the case without her testimony. The record then discloses the following:

"Commissioner Curtis: The carrier rests on the evidence already presented. This woman, the claimant, mentions a nurse who treated her, and who is now in the employ of the company, to show she had an accident and that she treated her for same—

"Mr. Isaacsen (interrupting): I object to that.

"Commissioner Curtis (continuing): and the company has refused to produce her here as a witness, and on those grounds I make the award, as I am of the firm opinion that the testimony presented isn't facts.

"Mr. Isaacsen: I now ask that the company be given a chance to bring this woman, Mrs. Wait. There is nothing in the testimony to show that this claimant met with an accident, and the words were put in by yourself—

"Commissioner Curtis (interrupting): This woman testified that

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the nurse treated her immediately after she came out. The only conclusion that can be formed is that the case isn't being produced here.

"Mr Isaacsen: I ask for an adjournment.

"Commissioner Curtis: I wanted to give you an adjournment, and you didn't want it. You are trying to pull over something—

"Mr. Isaacsen: I am not trying to pull anything over, and you well know it.

"Commissioner Curtis: The minutes will show that— (At this point Mr. Isaacsen threw his papers on the table and left his chair.)

"Commissioner Curtis: Don't throw your papers down like that. You are not worrying me any. We have your statement there that you would stand on the testimony—that you will rest on the testimony presented.

"Mr. Isaacsen: From what you said, I am asking that the case be adjourned one week.

"Commissioner Curtis: This same witness that you claim you were to have here is still in your employ and you have failed to produce her.

"Mr. Isaacsen: I didn't know she was still in our employ.

"Commissioner Curtis: This woman claims to have seen her there.

"Mr. Isaacsen: I think this witness is mistaken.

"Commissioner Curtis: That's the only thing in which she is mistaken."

The hearing was then adjourned one week. On the adjourned day the nurse was produced as a witness, and testified that she treated the infected finger, and that the claimant told her that it was caused by the ring, and said nothing to the effect that a window had fallen on the finger. The witness produced a book in which she kept a record of serious cases. It contained an entry made at the time when she treated the claimant appearing in its regular order in the book and containing the statement:

"Infection on small finger, left hand, due to tight ring. Wet dressing of opium and lead. Sent to Dr. Gibson to have lanced."

—and dated August 21, 1918. During the examination of this witness the deputy commissioner turned to the report of Dr. Gibson, made September 20, 1918, in which he stated that first treatment was rendered by him on August 22d, and that the claimant stated to him that a car window had fallen on her hand. The deputy commissioner commented on what apparently seemed to him a singularity that the claimant on August 21st should tell the nurse that the injury was caused by the ring, and that the doctor in his report of September 20th should say that the claimant had told him that the injury was caused by the fall of a window. The inconsistency in the two statements seemed to impress the deputy commissioner as being greatly to the disparagement of the nurse, entirely overlooking the fact that the statement to the doctor was the one subsequently made, and that it might have been an afterthought by the claimant, and that in any event it was her self-serving declaration, and according to the most elementary rules of evidence tended in no degree to discredit the nurse. We quote again from the record:

"Commissioner Curtis: Just what does Dr. Gibson mean there on the 22d, the next day? Why don't you add something in that record?

"Mr. Isaacsen: What do you want me to do with this report of Dr. Gibson's?

"Commissioner Curtis: I just want to know why there is such a change in the two reports.

"Mr. Isaacsen: I don't know; how should I?

"Commissioner Curtis: Well, there it is.

"Mr. Isaacsen: You accept one part of the testimony, but won't accept the other, which is sworn testimony. I can't do anything more than to bring the witnesses here and testify. I only can do my duty

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to my company, and I tried to do that. I presented the evidence and testimony.

"Commissioner Curtis: I am not interested in your dealings with your company. I am here to deal out compensation."

At the conclusion of the hearing the deputy commissioner announced his decision in favor of the claimant. The attorney for the appellant announced his intention to appeal, which drew from the deputy commissioner the following statement:

"You might enter in the minutes that I did not place credence in the witnesses that testified, as their mode of testifying was not satisfactory."

We have not attempted to reproduce all that was said by the deputy commissioner. The record is replete with improprieties, and we may regretfully add that numerous records have come under our observation which have been marred by the indiscretions of this official. The statute (Workmen's Compensation Law [Consol. Laws, c. 67] § 20) gives to any party a right to present evidence and to be represented by counsel. Clearly witnesses and counsel are entitled to respectful and courteous treatment. Sarcasm, insinuations, sneers, ridicule, and intimidation, all of which were indulged in by the deputy commissioner, have no place in the administration of justice. His attitude was not that of an impartial judicial officer, patiently attempting to develop facts, regardless of which side might be helped by such facts. His attitude was rather that of a belligerent and aggressive partisan attorney, seeking to develop only such facts as were favorable to the party he represented. In any well-conducted court, such comments and statements as were indulged in by the deputy commissioner would not be tolerated on the part of an attorney. If he persisted therein after admonition, he would subject himself to discipline. The indulgence in such conduct by a presiding officer, clothed with judicial or quasi judicial functions, and who is amenable for his own conduct to no one in the tribunal over which he presides, and in whose keeping is the dignity of such tribunal and the impartial administration of justice, is particularly reprehensible, and might well be characterized in severer terms. If an attorney would be subject to discipline for similar conduct, what can be said of a presiding officer, who takes advantage of his official position to indulge in methods which should not be tolerated in another? His publicly expressed intimations, repeatedly indulged in at the very time that the witnesses were giving their testimony, that they were not telling the truth, constituted gross improprieties.

It is conceivable that during a judicial hearing evidence of perjury on the part of a witness might be so obvious as to call for immediate action. But such was not the case here. Such statements and comments on the testimony as it is proceeding from the witnesses, excites either embarrassment or hostility in the witness, according to temperament, and is not productive of that mental serenity which is essential to an accurate statement of the knowledge which the witness possesses. Ofttimes witnesses testifying in public are affected by a natural nervousness or stage fright. This is enhanced by such treatment as was accorded them in this proceeding, particularly when it comes from the judge or presiding officer. Such witnesses need reassurance, rather than harshness. The effort should be to get from them as naturally as possible the testimony which they have it in their minds to give. Methods which disconcert or humiliate or intimidate witnesses are sometimes reflected in the distortion of their testimony. They do not give it as they would if their minds were at ease. The mental disturbance of the witnesses is naturally greater when it is produced by the presiding officer rather than by an attorney. We cannot be sure in this case that the witnesses have expressed themselves as they intended to do. They were subjected to a species of duress or intimidation which may well

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have had the effect of unconsciously suppressing what was in their minds to testify, or discoloring that which they did testify.

It is true that this award appears to have been made by three of the commissioners. But they did not take part in the development of the testimony, and we have no means of knowing how much personal consideration they gave to the case. The statute (section 65) provides that the award of a deputy commissioner only needs the approval and confirmation of the commission to make it the award of the commission. It is a fundamental and primary right of every party to have a fair and impartial hearing, and that the person who acts as his judge or arbiter shall be without prejudice or bias. More particularly should this right be guarded under a statute where the determination of the judge or arbiter in respect to a question of fact is final and cannot be reviewed. We make no criticism and intend no reflection on any of the commissioners. We express no opinion as to the merits of this claim. The claimant may or may not be entitled to an award. What we hold is that the remarks and comments by the deputy commissioner manifested bias and prejudice against the appellant, and that his treatment of the witnesses and manner of examining them may have been productive of the suppression or incomplete development of their testimony, constituting legal error, and that the appellant has not had a fair hearing, and has been deprived of its day in court.

The awards should be reversed, and the proceeding remitted to the commission for another hearing. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

O'BRIEN

v.

PENNSYLVANIA R. CO.*

1. COMMERCE—INTERSTATE TRANSPORTATION.

The interstate transportation of goods did not end with the placing of the goods on pier for delivery to consignee, where consignee had not taken possession or paid freight charges, and the 48-hour period given him in which to remove consignment had not expired.

2. COMMERCE—WORKMEN'S COMPENSATION—INTERSTATE COMMERCE.

Watchman of consignment placed upon pier after interstate shipment, who was killed while so employed, before consignee had taken possession or paid freight charges and before the expiration of the 48-hour period given him in which to remove consignment, is not entitled to an award under Workmen's Compensation Law, having been killed while guarding an interstate shipment.

Appeal from State Industrial Commission.

Proceeding by Ellen O'Brien, under the Workmen's Compensation Law (Consol. Laws, c. 67), for compensation for death of Patrick

*Decision rendered, May 7, 1919. 176 N. Y. Supp. 390.

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O'Brien, opposed by the Pennsylvania Railroad Company, employer and self-insurer. From an award of the State Industrial Commission, the employer and self-insurer appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane and Henry T. Kellogg, JJ.

Burlingham, Veeder, Masten & Fearey, of New York City, for appellant.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

KELLOGG, J. The deceased was employed by appellant as a watchman at Piers 27, 28, and 29, North River, New York City. These piers were maintained by the appellant for the receipt and delivery of freight from cars ferried across the river upon floats from points in the state of New Jersey. In the rear of the piers, running the whole length thereof, was an open space on West street, commonly known as the "farm." Overflow produce arriving at the piers was placed upon the farm, there to await removal by consignees. The deceased was engaged in acting as watchman for a shipment of potatoes in barrels from the state of Florida, which had arrived at the piers, and had been placed upon the farm, when he was run down by a motor truck and killed. The consignee was entitled to 48 hours' notice before removing the consignment. Before this time had elapsed, and before the consignee had taken possession of the shipment, or paid the freight charges thereon, the accident happened.

[1] Within well-settled principles of law, transportation of the potatoes, which was interstate, had not ended when the accident occurred. McNeill v. Southern Railway Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Cleveland, Cincinnati, Chicago & St. Louis v. Dettelbach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453; Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Jennings v. Clyde Steamship Co., 148 App. Div. 615, 133 N. Y. Supp. 298; Chalmers v. N. Y. Central R. R. Co., 175 App. Div. 239, 161 N. Y. Supp. 577. The case of Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, is not in disagreement with the cases cited. In that case an employe was engaged in moving coal from the storage tracks of the consignee to the coal chutes of the consignee; the coal being in possession of the consignee at all times during the work which was being performed by the employe at the time of his injury.

[2] The deceased in this case having been engaged at the time of the accident in guarding an interstate shipment, the transportation of which had not ceased, an award could not properly be made.

The award is reversed, and the claim dismissed. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

TROUTON

v.

M. J. SHEEHY ICE CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—FINDINGS OF INDUSTRIAL BOARD—REVIEW.

Notwithstanding Workmen's Compensation Law, § 21, providing that in the absence of substantial evidence to the contrary it shall be presumed that "the injury did not result solely from the intoxication of the injured employe while on duty," it is not the province of the court, on appeal from an order of the State Industrial Commission, refusing to make an award by reason of intoxication, to consider the facts, except for the purpose of determining questions of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEATH—INTOXICATION—EVIDENCE.

Evidence *held* to support a determination of the State Industrial Commission that death resulted solely from the intoxication of deceased, notwithstanding Workmen's Compensation Law, § 21, providing that, in the absence of substantial evidence to the contrary, it shall be presumed that "the injury did not result solely from the intoxication of the injured employe while on duty."

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Selma Trouton for compensation for the death of Joseph Trouton, opposed by the M. J. Sheehy Ice Company, the employer, and the Zurich General Accident & Liability Insurance Company, the insurance carrier. From an order of the State Industrial Commission, refusing to make an award of compensation, claimant appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Myers & Goldsmith, of New York City (Gordon S. P. Kleeberg, of New York City, and Joseph B. Kaufman, of Brooklyn, of counsel), for appellant.

Jeremiah F. Connor, of New York City (William Butler, of New York City, of counsel), for respondents.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. Joseph Trouton, on the 6th of April, 1917, was employed by the M. J. Sheehy Ice Company as a driver of one of its ice wagons. It had a place of business at 132d street, New York, which is located upon a dock adjacent to the Hudson river. On the day in question the decedent took out his wagon load of ice at 6 o'clock in

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*Decision rendered, May 7, 1919. 176 N. Y. Supp. 45.

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the morning, and along about 2 o'clock in the afternoon called up the office of the company and reported that he was not in a condition, owing to drink, to complete his deliveries, and asked for a helper. An assistant was sent out to complete the delivery and bring in the team, and the decedent came back to the office and was sent home. He left the office to get his coat from the wagon, and this is the last seen of him until another employe of the company, coming from a small building on the dock, says he saw a pair of feet just disappearing over the edge of the dock, and later in the day the body of the decedent was taken from the river. The State Industrial Commission found the facts warranting the making of an award, except that it was held that the decedent came to his death holly because of his intoxication, and upon this appeal it is urged that this determination of the commission is not warranted by the evidence.

[1] Section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) provides that, in the absence of substantial evidence to the contrary, it shall be presumed that "the injury did not result solely from the intoxication of the injured employe while on duty," but in this case there was such substantial evidence. Indeed, the evidence was preponderating that the decedent was staggering drunk at the very time of the accident, and all of the known facts point to this as the proximate cause of the death. It is not, however, the province of this court to consider the facts, except for the purpose of determining questions of law, for, as Mr. Justice Howard says in Matter of Rhyner v. Hueber Building Co., 171 App. Div. 56, 58, 156 N. Y. Supp. 903, 904:

"It is not well for this court to fall into the habit of discussing the facts, even for the purpose of showing that the findings of fact are reasonable and meet with our approbation. We cannot, except by usurpation, invade the realm of facts, for it was the clear intent of the Legislature that the 'decision of the commission shall be final as to all questions of fact.' * * * The commission is the sole judge and the 'final' judge of the facts, and this court is not only forbidden to trespass upon the jurisdiction of the commission in this field, but, by section 20 of the act, it is circumscribed even in its review of questions of law. It was the purpose of the Legislature to create a tribunal to do rough justice—speedy, summary, informal, untechnical." Matter of Tirre v. Bush Terminal Co., 172 App. Div. 386, 389, 158 N. Y. Supp. 883; Uhl v. Guarantee Construction Co., 174 App. Div. 571, 573, 161 N. Y. Supp. 659; Matter of Dale v. Saunders Bros., 218 N. Y. 59, 63, 112 N. E. 571, Ann. Cas. 1918B, 703.

[2] There is evidence in this case supporting the determination of the State Industrial Commission, and the order should be affirmed.

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COURT OF CIVIL APPEALS OF TEXAS.

BEAUMONT.

AMERICAN INDEMNITY CO.

v.

DINKINS. (No. 449)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"COURSE OF EMPLOYMENT."

Petition alleging that deceased, employed as an electric engineer, registered out for the day at the entrance gate, and started for home to secure rest, and had gotten a short distance, when he was struck by an automobile, was demurrable because it showed that injury was not sustained in the "course of employment," within Employers' Liability and Workmen's Compensation Law, pt. 1, as that term is defined by section 1, pt. 2.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other dfinitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—INSTRUCTIONS

The terms of the Employers' Liability and Workmen's Compensation Law should be construed with the utmost liberality of which they are legally capable.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"COURSE OF EMPLOYMENT."

Injuries sustained by deceased, three-quarters of a mile from refinery where he was employed as electric engineer, after he had registered out for the day and started for home to secure rest, did not occur while he was engaged in the furtherance of the affairs of his employer, within Employers' Liability and Workmen's Compensation Law, pt. 2, § 1, defining the phrase "injury sustained in the course of employment."

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REFUSAL TO FIND UNDISPUTED FACTS.

In suit under Employers' Liability and Workmen's Compensation Law, *held,* under the undisputed evidence, that court erred in refusing to find as a fact that employe was injured after he had punched the time clock and after he had been relieved for the working day.

(For other cases, see Master and Servant, Dec. Dig. § 402.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REFUSAL TO FIND UNDISPUTED FACTS.

In suit under Employers' Liability and Workmen's Compensation Law, *held,* under the undisputed evidence, that court erred in refusing to find that the injury occurred on one of the main public roads, which was not the only road leading to and from the plant of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 402.)

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*Decision rendered, April 15, 1919. Additional Findings of Fact, April 30, 1919. 211 S. W. Rep. 949.

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6. MASTER AND SERVANT—WORKMEN'S COMPENSATION —BURDEN OF PROOF.

Parties who base their right of recovery on the Workmen's Compensation Law must show that they are entitled to compensation within the terms of the act, in view of part 2, § 5, providing that the rights and liabilities of parties shall be determined by the provisions of the act.

(For other cases, see Master and Servant, Dec. Dig. § 402.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURY RECEIVED IN THE "COURSE OF EMPLOYMENT."

To come within the term "injury received in the course of employment," as defined by Workmen's Compensation Law, pt. 2, § 1, it must be shown that the injury originated in the work, and, further, that it was received by the employe while engaged in the furtherance of the affairs of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION —RELATION OF EMPLOYER AND EMPLOYEE—TERMINATION.

Although an employe's employment may continue for an interval after he has ceased working, there must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is to be determined by the facts themselves.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from District Court, Jefferson County; A. E. McDowell, Judge.

Suit by Mrs. A. P. Dinkins, for herself and as next friend for her two minor children, Jack Dinkins and Emma Marie Dinkins, against the American Indemnity Company, to recover compensation under Employers' Liability and Workmen's Compensation Law. Judgment for plaintiffs, and defendant appeals. Reversed, and judgment rendered for appellant.

Minor & Minor and Sam C. Lipscomb, all of Beaumont, for appellant.

Jas. A. Harrison, of Beaumont, for appellees.

BROOKE, J. This suit was instituted by Mrs. A. P. Dinkins for herself and as next friend for her two minor children, Jack Dinkins and Emma Marie Dinkins, against the American Indemnity Company to recover workmen's compensation under the provisions of the Employers' Liability and Workmen's Compensation Law of the State of Texas, as embodied in chapter 103, p. 269, General Laws of 1917 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91).

Plaintiffs alleged that the defendant issued a policy of insurance to the Magnolia Petroleum Company, insuring employes working at the Magnolia refinery at Beaumont against injuries resulting in death and received and sustained in the course of employment, and that the policy so issued was to insure the liability and pay the compensation provided for in said Employers' Liability and Compensation Act; that the Magnolia Petroleum Company employed more than 1,500 persons, and had insured its employes with the defendant, American Indemnity Company; that A. P. Dinkins on September 30, 1917, was an employe of the Magnolia Petroleum Company as an electrical engineer at its refinery at Beaumont, Tex., and had been continuously in the service of said Magnolia Petroleum Company in such capacity for several

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years; his duties required him to work until 12 o'clock at night, at which time he would leave the refinery, go to his home for rest and refreshment, and return the next day to continue his duties; that the Magnolia Petroleum Company, as above said, employed about 1,500 men at said refinery, and worked same in shifts, making three shifts every 24 hours; that when the men in one shift would be going out, the men in the next shift would be coming in, and these employes met and passed each other in coming in and going out of the refinery; that the refinery was inclosed, and all employes were required to enter and leave the refinery at the big entrance gate, where a watchman was stationed, who let them in and out, and where the employes punched in as they entered and punched out as they left the refinery; that the road to the refinery was laid out and built by Jefferson county at the instance of the owners of the refinery, and that the Magnolia Petroleum Company, in addition to its tax for road and bridge purposes, contributed both material and labor in the construction of said road; that said road is the only paved or shelled road leading to the refinery, and was the road used exclusively by its employes, who ride in and on automobiles, bicycles, and motorcycles, and is the road provided and maintained by the Magnolia Petroleum Company for the use of its employes going to and coming from their work at the refinery; that in going to and coming from their work the employes met and passed each other in great numbers, and that employes, especially those changing shifts at 12 o'clock at night, were subjected to dangers in using said road not applicable to the general public at large.

It is further alleged that on September 20th, at about 12 o'clock at night, A P. Dinkins, deceased, punched out for the day at the refinery gate, as he was required to do, got on his motorcycle, and started for home to secure needed rest and refreshment, so he could pursue his labors the next day, and was riding on and along said paved road, and had gotten a short distance from the refinery gate, when he was struck by an automobile traveling on said road, and sustained injuries which resulted in death; that the automobile which struck Dinkins was being driven by Frank Ellis, an employe of the Magnolia Petroleum Company, who was on his way to work; that plaintiffs are the sole and exclusive beneficiaries of A. P. Dinkins, deceased. Plaintiffs further alleged that the Industrial Accident Board of Texas, upon application of plaintiffs for compensation under said act, fully acquitted and discharged the defendant from all liability on account of the death of A. P. Dinkins, and this suit was filed May 13, 1918, to set aside the award for said Industrial Accident Board and to recover the compensation provided for in the act.

To plaintiffs' petition the defendant filed a general demurrer and special exceptions and a general denial. By special answer defendant admitted that it was insurer for the Magnolia Petroleum Company, but alleged that A. P. Dinkins was not engaged in any work or employment for the Magnolia Petroleum Company at the time of his injury, and that the said Dinkins was not under the control and was not performing any service for his employer at the time of the injury, and that said injury did not have to do with, nor originate in, the work or business of his employer, and was not received by said Dinkins while engaged in or about the furtherance of the affairs of his employer; that said Dinkins was on a mission of his own, and far removed from his place of employment, when said injury occurred; and specially denied that the road or street upon which Dinkins was injured was in any way controlled by the Magnolia Petroleum Company; and denied, further, that the road at that point where Dinkins was injured was provided and maintained by the Magnolia Petroleum Company for the use of its employes; and further denied that the employes of Magnolia Petroleum Company were required to use said road or any other particular road in going to and coming from work, but that, on the other hand, said employes were free to choose any one of several highways

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of travel in going to and coming from said refinery. Defendant further specially denied that the terminus of said road was at the gate of the Magnolia Petroleum Company, and alleged that the place of injury was one-half mile west of the refinery, on a street within the corporate limits of Beaumont, Tex., and that said road constituted a part of one of the main highways from Beaumont to Orange, Tex.

Judgment was rendered August 5, 1918, in favor of plaintiffs, for $4,800; motion for a new trial was filed August 6, 1918; and amended motion for new trial was filed September 4, 1918, and in the order overruling same defendant was granted 90 days after adjournment of the term within which to prepare and file a statement of facts and bills of exception. The term at which this case was tried expired September 28, 1918; transcript and statement of facts were filed December 4, 1918, and this cause is properly before the court for review.

[1] In the first assignment of error it is complained that the trial court erred in overruling defendant's general demurrer in its original petition. Under this assignment there is a proposition to the effect that—

"The petition shows on its face that Dinkins did not sustain his injury in the course of employment, but, on the other hand, it affirmatively shows that he was injured after he had severed his relation of employe."

We quote from plaintiffs' original petition as follows:

"On or about September 30, 1917, at about 12 o'clock at night, A. P. Dinkins, deceased, punched out for the day at the refinery gate, as he was required to do, got on his motorcycle, and started for home to secure needed rest and refreshment, so he could pursue his labors the next day, and was riding on and along said paved road, and had gotten a short distance from the refinery gate, when he was struck by an automobile traveling on said road."

Further, in paragraph 5, plaintiffs allege that "the said Dinkins was an employe of the Magnolia Petroleum Company as an electrical engineer"; thus excluding the idea that his duties as an employe required him to go outside of the plant for any part of the work.

Section 1, part 1, of the Employers' Liability and Workmen's Compensation Law of 1917, provides for compensation to be paid by the insurer for "injuries sustained in the course of employment"; and section 1, part 2, of the Act, p. 292, defines the phrase, "injury sustained in the course of employment," as follows:

"The term 'injury sustained in the course of employment,' as used in this act, shall not include:

"(1) An injury caused by the act of God," etc.

"(2) An injury caused by an act of a third person intended to injure the employe because of reasons personal to him," etc.

"(3) An injury received while in a state of intoxication.

"(4) An injury caused by the employe's willful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employe while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or elsewhere." General Laws 1917, p. 292.

The main question in this case is whether or not Dinkins sustained injuries in the "course of employment," as that term is defined in the Texas Employers' Liability Act.

[2] We are of the opinion that it is the duty of this court to give to the terms of the act the utmost liberality of which they are legally capable, to the end that the beneficent purposes of the act may be effectuated. However, we must remember that the purpose of the

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Workmen's Compensation Law, as set out in the preamble of the act, was to make more certain the recovery of compensation for injuries to employees in cases where an action would ordinarily exist at common law, to the exclusion, among other things, of the doctrine of assumed risk. An eminent authority calls such legislation as the Workmen's Compensation Law an attempt at "justice without law," and for this reason we are of the opinion that, since the common-law rules of liability have been abrogated in cases of this nature, there is all the greater reason that the court should endeavor to follow the spirit of the statute.

The Texas Legislature, unlike the Legislatures of other states, has incorporated in the act certain definitions which must be taken into consideration when applying the provisions of the law to an established set of facts. It defines by plain and unmistakable terms the words "injury received in the course of employment," by stipulating that the phrase shall include "all other injuries of every kind and character having to do with, and originating in the work, trade, business or profession of the employer, received by the employee while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or elsewhere."

This record shows that Dinkins did not receive the injury while engaged in or about the furtherance of the affairs of the Magnolia Petroleum Company, but, on the other hand, it plainly shows that he was bent on his own rest and refreshment, and that at the time of the injury the employer was exercising no control whatever over him; and, in addition to this, the petition shows clearly that the injury did not originate in the work. It was an injury that might happen to any person on any street, regardless of his employment.

We have been unable to find any language in the laws of other states, similar to the language quoted, which defines what shall be regarded as an "injury received in the course of employment." The Legislature of Texas did not intend to adopt the judicial construction placed upon the terms of the acts by the other states, and this is proved by the fact that there is incorporated in the Texas act a definition of that term.

As said by a learned judge in the case of Ocean Accident & Guaranty Co. v. The Industrial Accident Commission, 173 Cal. 317, 159 Pac. 1042, L. R. A. 1917B, 336:

"Under familiar principles, when a statute which has received judicial construction by the courts of one state is adopted and re-enacted by another state, it is so adopted and re-enacted in consonance with the construction put upon it by the courts of the first sovereignty. The common sense of this rule of construction is so apparent that it needs in its support nothing more than the obvious suggestion that, if the later lawmakers did not design that the construction put upon any given language should obtain, they would modify and change that language to express their different intent."

The Texas Legislature has seen fit to modify the language of our compensation act by defining what shall be regarded as "an injury received in the course of employment" by defining it as one which must "originate in the work," and in addition be received by the employee "while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or elsewhere."

In our opinion, the decisions of other states are not of great service in construing the Texas Workmen's Compensation Act. But it may be well to show the general trend of authorities. In the case of Federal Rubber Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968, the following language is used:

"The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear

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to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The above-quoted language was used by the court in dealing with the construction to be given to the language "arising out of and in the course of employment," without the aid of a definition as provided for in the Texas act, and, as seen from the quoted passage above, by attempting to modify the language by defining it, it clearly appears that the spirit of the Texas law requires that the employee must be actually about the furtherance of his master's business when the casualty occurs; otherwise it will be regarded simply as one of those unhappy accidents such as might happen to any of us, and the responsibility for which cannot be laid at the door of the employer.

Was the injury sustained by Dinkins one which originated in the work of his employer, and was it also sustained while he was engaged in or about the furtherance of the affairs of his employer? If so, then what business of his employer was he performing? If one is proceeding to his home for needed rest and refreshment, can he be regarded as engaged in the furtherance of the affairs or business of his employer? If so, then by parity of reasoning the act should be construed to cover injuries received by an employee while he is on his vacation. It is plain that Dinkins sustained his injury after he had abandoned his duties which involved the furtherance of the affairs of the employer.

Nearly all the authorities which we have been able to find are those dealing with laws which provide for compensation when the injury sustained "arises out of and in the course of employment"; and we believe these words are more comprehensive and there is more latitude for construction than is permitted by the definition in the Texas act, as note the following quotation from Honnold on Workmen's Compensation, p. 320:

"According to the usual language of the acts, to warrant recovery of compensation for the injury or death of a workman, the injury must be one 'arising out of and in the course' of his employment. The phrase is used in the same sense in the acts of England and of many of the states, and, though its literary construction is well settled, its application to particular cases has given rise to differences of opinion not easily harmonized. Attempts of the courts to formulate general rules relative to the distinction between the terms 'out of' and in the 'course of' have not been entirely successful. All agree, however, that the terms are not intended to be synonymous. An injury may be received in the course of employment and still have no casual connection with it so that it can be said to arise out of the employment." Brewing Co. v. Dist. Ct., 129 Minn. 176, 151 N. W. 912. "But it is difficult, if not impossible, to conceive of an injury arising out of, and not also in the course of, the employment.

"Many accidents occur in the course of, but not out of, the employment; but I am unable to think of any that could arise out of, and not also in the course of, the employment." Farwell J. N. Leach v. Oakley, etc., Co., 4 B. W. C. C. 98.

I think it is impossible to have an accident arise out of [the employment] which is not also in the course of the employment; but the converse of this is quite possible, as, for instance, if a workman were shot by a lunatic, or struck by lightning, while at the moment engaged in his work. In a great many cases, however, the two phrases do not admit of separate consideration, and the present is one of these cases. If this accident took place in the course of the workman's employment, it also indubitably arose out of that employment. If not, not." McLauchlan v. Anderson, 4 B. W. C. C. 379.

"The importance of distinguishing between these terms arises from the fact that each represents an element essential to, but not authorizing, recovery of compensation without the presence of the element represented

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by the other. In other words, even though the injury occurred in the course of the employment, if it did not arise out of the employment there can be no recovery; and, even though it arose out of the employment, if it did not arise 'in the course of the employment' there can be no recovery.

"The words 'out of' point to the origin and cause of the accident or injury; the words 'in the course of' to the time, place, and circumstances under which the accident or injury takes place. The former words are descriptive of the character of quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident, as conveyed by the words 'out of,' involves the idea that the accident is in some sense due to the employment. It must result from a risk reasonably incident to the employment." Bryant v. Fissel [84 N. J. Law, 72], 86 Atl. 458.

Mr. Honnold, at page 353, says:

"The term of employment is not necessarily identical with the time during which services are being performed for the employer. But where, by the terms of the employment, an employee is to be ready at any hour of the day or night to perform certain duties, it does not follow that any accidental injury which he may receive during the course of the 24 hours is compensable. To have all the requisites for compensation present, it is essential that he be, in fact, discharging some duty in the course of the employment. The term of employment includes time spent in traveling on the employer's business, and a reasonable latitude of acts not in furtherance of the business, but done during working time."

On page 346 he further says:

"It is essential to the right to compensation that the injury shall have been received in the course of the workman's employment; that it shall have been received while he was doing some act reasonably incident to his work. An accident or injury is so received when it occurs when he is doing what a man in like employment may reasonably do within a time during which he is so employed, and at a place where he may reasonably be during that time. 'Course of employment' includes acts in which the employer has acquiesced, though they are not done in a strict performance of the employee's duties."

In the McNicols Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, the question was whether the deceased received an "injury arising out of and in the course of his employment," within the meaning of the act. The court said:

"In order that there may be recovery, the injury must both arise out of and also be received in the course of employment. Neither alone is enough. * * * It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment where there is apparent to the rational mind * * * a causal connection between the conditions under which the work is required to be performed and the resulting injury. * * * But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In the case of Ocean Accident & Guaranty Co. v. Industrial Accident Board, supra, a California case, the court says:

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"In Walters v. Stavely Coal & Iron Co., Ltd., 4 B. W. C. C. 303, a miner was proceeding to his work along a footpath prepared by his employers for their workmen's convenience. He slipped and sustained injury. There was evidence that the employers knew that the footpath was not safe. The question considered by the House of Lords was: Did the accident 'arise out of the employment, and did it arise in the course of the employment'? It was held that there was 'no evidence which would have justified a finding that the accident arose out of the employment,' and it was declared to be immaterial that the employee was injured upon this footpath prepared for his use by his employers, 'since the man was merely going to his employment.' * * *

"In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury 'growing out of and incidental to his employment,' since a necessary part of the employment is that the employee shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the services he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks."

This authority further says:

"With these authorities before us, we think the governing principles of all the decisions are not difficult of discernment. The first of these is that there are excluded from the benefits of the act all those accidental injuries which occur while the employee is going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways."

These quotations from the above cases are only argumentative, and cannot be regarded as authoritative on the point at issue in this case, but they have their weight as indicating what was probably the intention of the lawmakers in enacting the Workmen's Compensation Law of the several other states.

We have given our best consideration to the proposition before us. We have utilized all the time that we could give to this difficult and perplexing proposition. We have arrived at the conclusion that the court should have sustained the demurrer, and that it was error not to do so.

[3] The second assignment complains that the trial court erred in rendering judgment against defendant because the evidence showed conclusively that the injury did not originate in the work, and it did not occur while the said A. P. Dinkins was engaged in or about the furtherance of the affairs or business of the Magnolia Petroleum Company; and the proposition is that plaintiffs were not entitled to recover because the undisputed evidence showed that the injury did not occur while Dinkins was engaged in or about the furtherance of the affairs of his employer, and the injury therefore did not come within the terms of the compensation act.

It is useless for us to set out the testimony that was adduced upon the trial of this case. It will be sufficient to say that it was proven by one C. C. Wonder that he worked in and around the same place with Mr. Dinkins.

"In fact, I worked with him, and am the man that relieved Mr. Dinkins. My customary road that I used in going to the refinery was Madison avenue road. Will state that it was my custom to be at the refinery at least 10 minutes of the time for me to go on, and I relieved Mr. Dinkins. I relieved him on the night he was killed. It is a rule out

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there to relieve the man when you get there; it don't make any difference if it is between 11 and 12 o'clock. Whenever a relief man comes on he goes and gets ready for work and relieves the man. The man that he relieves is free to do whatever he wants to after he punches out at the gate. Some of the men don't have to change their working clothes to work. Yes, sir; I have worked on the shift from 12 to 8 in the morning. At 12 o'clock a man by the name of H. T. Robins relieves me—at 12 o'clock; that is, he is one of the relief men that relieves me. When I finish my work and am relieved I always go home; I go to the big gate, however, first, and punch out, before I leave for home. It is between three and five hundred feet from the place where I work to the gate where we punch out."

He also testified:

"I work by the hour. My time stops when I leave the refinery. Yes, sir: I do the same kind of work Mr. Dinkins does. I have never performed any duties for the Magnolia Petroleum Company outside of the yards. I do not consider myself an employee of the company after I leave the gate. My time stops. The company does not have any control over me after I leave the refinery gate until I get back the next day. * * * I work eight hours a day. The night that Mr. Dinkins was killed I think I relieved him about ten minutes to twelve, and I think he left just as soon as I relieved him; and I believe it was 12:25 when Mr. Jones came up and told me that Mr. Dinkins had been killed."

Courtenay Marshall, witness for defendant, testified that when a man was relieved from his customary and ordinary work at the refinery his employers no longer exercised any control over him whatever.

The court found in this case that Dinkins was operating his motorcycle on a public street at night, without a light, which was in violation of law, and consequently an unreasonable way. Dinkins could not, therefore, have recovered under the rules laid down by the statutes of other states, and this would be an additional reason why the decisions of other states are not to be regarded as binding authority in this state.

It is our opinion it was not the intention of the Texas lawmaking body to include an injury such as the one under consideration. There was no relation of master and servant at the time. There was no duty on the part of any one to see that Dinkins reached his home in safety. If a person should be regarded as performing service for his master, when he goes home to rest, then why should he not be regarded as furthering his employer's business while he is eating his food; and, on this theory, should he be injured, why should he not be able to recover? We are of opinion that the court erred, as complained of, in rendering judgment against the defendant, and this assignment is in all things sustained. Walters v. Stavly Coal & Iron Co., 4 B. W. C. C. 303; Leverone v. Travelers' Ins. Co., 219 Mass. 488, 107 N. E. 349; Ocean Accident & Guaranty Co. v. Industrial Accident Board, 173 Cal. 313, 159 Pac. 1044, L. R. A. 1917B, 336.

The third assignment complains that the court erred in rendering judgment against the defendant because the undisputed evidence shows that the said A. P. Dinkins was not engaged in or about the furtherance of the affairs or business of his employer at the time of the injury herein complained of, and because said injury occurred at a time when the said A. P. Dinkins was on a mission of his own, and at a time when the relation of master and servant did not exist, and the injury cannot, as a matter of law, be regarded as within the purview of the Workmen's Compensation Act.

The proposition under this assignment is that the Employers' Liability and Workmen's Compensation Law is not intended to cover injuries received by an employee while he is not engaged in or about his duties as an employee.

Having passed on the assignments heretofore, it is needless for us

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to add anything with reference to this assignment, and we, therefore, without further comment, sustain the assignment.

[4] The fourth assignment of error complains that the court erred in refusing to find as a fact that A. P. Dinkins was injured after he had punched the time clock and after he had been relieved for the working day of September 30, 1917, same being finding No. 3, requested by the defendant.

The appellant requested the trial court to find the facts as set out in the fourth assignment of error. The court refused the request and appellant excepted. The court found:

"All employees at the refinery were required to enter and leave the refinery at the big entrance gate where a watchman is stationed, to let them in and out. There is only one road to the refinery of the Magnolia Petroleum Company; this road leaves the Beaumont-Port Arthur road at Madison street and extends along Madison street, Grove street, and Burt avenue, and to the refinery's entrance gate. This road is graded up and paved, and, in addition to regular taxes, the Magnolia Petroleum Company contributed both labor and material at its own expense in the construction of this paved road. This is the only road leading to the refinery which is fit or suitable for automobiles, motorcycles, bicycles, and other vehicles, and is the road used exclusively by all the employees of the Magnolia Petroleum Company who go to and from their work in automobiles and other vehicles. Frank Ellis, also an employee of the Magnolia Petroleum Company, was on the shift which began work at 12 o'clock that night. He was traveling said road in his automobile to report for work, and A. P. Dinkins, who had just quit work, was riding home on his motorcycle along said road without lights on his motorcycle; Dinkins going the most direct, and only suitable, route home for needed rest and refreshment, and Ellis coming in to work, when the car of Ellis collided with the motorcycle of Dinkins, producing injuries which resulted in the death of Dinkins the same night. This collision occurred on Madison avenue, between Brooklyn and Irving streets, and about two minutes after Dinkins had left the refinery gate. I find as a fact that said road being the only road that could be used by the employees of the Magnolia Petroleum Company living in the city of Beaumont, going to and returning from their work, that the Magnolia Petroleum Company not only tacitly invited them to use said road, but practically required them to do so, and that employees at such refinery, while going in and out from work on said road, were subjected to the same danger of collisions and injury with each other as within the refinery grounds, and that the place where A. P. Dinkins was run over and killed by Frank Ellis was within the danger and hazard zone of the refinery."

C. F. Scruggs testified for plaintiffs as follows:

"At the present I am employed down there (at Magnolia refinery) as 'shift foreman.' I have charge of one eight-hour shift. On the night of September 30, 1917, I held the same position with that company as I do now. When I say 'shift foreman' I mean that I am foreman of the men working for my department during the hours that I work; I look after them during the eight hours they work. During the month of September they had three shifts; they were from 12 at night to eight in the morning, from eight in the morning until four in the afternoon, and from four in the afternoon until 12 at night. There are three shifts of eight hours each. During the month of September there was between three hundred and four hundred men employed on shift work; that is, there would be something like one hundred on a shift. In my judgment there was between twelve hundred to fifteen hundred men employed by the Magnolia Petroleum Company during the month of September, 1917. Mr. Dinkins was supposed to leave at 12 o'clock on the night of September 30, 1917. His relief man was supposed to relieve him at 12 o'clock, possibly a few minutes beforehand. When a man went off of the shift

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—quit his work for the day—he went to the general main entrance to get out. The gate was not locked, but was watched by a watchman, and when he got to the gate going out he had to register. There is a clock there and he had to punch out."

He further testified that Dinkins' duties were to operate the engine that furnishes the light for the yards and for the water pump and such like that. Continuing, he testified:

"Just as soon as the men punch out at the gate they are free to go where they please. They could go down any of those roads they wanted to, or they could take the car—that would be up to them; there is no restriction whatever."

And further:

"Q. What was the rule of you foremen about one man leaving before the other had changed his clothes and announced ready for work? Answer: Of course my orders come from the office, and they instructed me to have them change their clothes and come and report, and the man that they relieved turned the work over to him, and he wasn't permitted to change his clothes until after his relief man came and accepted his job. He had to wait until the relief man came and told him that he was ready to take the job over, and after that he was permitted to go and change his clothes, wash up, and put on his street clothes, and go to the gate and punch out, and he was at liberty to go wherever he pleased. He was on his own time and could go where he pleased. He was not required to take any particular road. He had a right to take the street car, or go down the road, or go down the cinder path on the street car track, or go through the road that runs south in the lower woods on out Buford street. The matter of his going and coming was up to him: there was no instructions as to what road he should take or how he was to come and go from his work. As I have stated heretofore, they had no discretion or control over him after he punched out at the big gate. From the pumphouse, where Mr. Dinkins worked, to the big gate, where they punch out, would be something like two hundred yards."

From our inspection of the record there is no evidence contrary to that above set out, and the court, under the circumstances, should have made the finding requested by the defendant. The court made no finding of fact whatever with reference to the relation of the work to the injury, and from his finding of fact that Dinkins was killed in the course of his employment he concludes, as a matter of law, that he was killed in the course of his employment. The court should have made this finding of fact as requested, and his failure to do so was error.

[5] The fifth and sixth assignments of error will be considered together, and are as follows:

(a) "The court erred in refusing to find as a fact that 'the injury which resulted in the death of A. P. Dinkins occurred on one of the main roads leading from Beaumont, Texas, to Orange, Texas, at a point more than three-fourths of a mile west of the plant of the Magnolia Petroleum Company,' same being finding No. 4 requested by defendant."

(b) "The court erred in refusing to find as a fact that the road upon which A. P. Dinkins was injured was not the only road leading from the plant of the Magnolia Petroleum Company to the resident section of Beaumont, and that there are several other ways employed by persons who work for the Magnolia Petroleum Company in going to and from their work, and that the map introduced by defendant correctly shows the different roads that may be taken by the employee in going to and coming from their work, same being embodied in finding No. 10 requested by defendant."

The record reflects that Dinkins was injured at a point more than three-fourths of a mile west of the refinery, on Madison street, which was a part of the Beaumont-Orange road. The point of injury was no

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more in the hazard zone of the refinery than any other paved street in Beaumont.

D. W. Webster testified as follows:

"I made this map which you exhibit before me and which has already been introduced in evidence. * * * This map correctly represents the conditions of the roads out in the vicinity of the refinery. The length of those blocks between Irving avenue and Grove street is about 800 feet. From this point, which is marked 'Broken tree scene of accident,' to the refinery gate is about ¾ of a mile, and I will also state that I measured the distance myself. * * * The distance from the city limits to the scene of the accident is about 2,800 feet. I have not traveled over these streets that lead from Poplar street over to Sherman and Grant streets lately, but I have looked down them and saw they were good roads. It showed that it was a good, plain, open road. * * * Those streets that you see marked on the map 'good earth roads' are well-defined streets; that is, those I looked down are well defined. It is about one hundred and seventy-five yards from the point of the accident to Irving street. I measured that on the ground. I have also been over that portion of the street that leads from Madison avenue to the Orange road, and will also state that that is a portion of the main highway that leads from Beaumont to Orange."

C. L. Scherer testified:

"I am the city engineer of Beaumont. I have been here (in Beaumont) thirteen years. During that time the Magnolia Petroleum Company has never expended any money or anything in the way of material that I know of helping to keep up Madison avenue. Neither has the Magnolia Petroleum Company exercised any control over Madison avenue that I know anything about. They have not paid anything for the use of that street in the last twelve years that I know anything about. The shell was furnished by the county and is still being furnished by the county when any repairs are to be made out there, and the city does the work; this is the agreement between the city and the county. Yes, sir; I was living in Beaumont when Madison avenue was built. I could not tell you why they shelled Madison avenue instead of some other street out there. The county is the one that picked the street to be shelled, but the reason why I couldn't tell, unless it was to be the Orange county road. Yes, sir; that is a continuation of the Orange county road, and is the main traveled highway from Jefferson county to Orange county. * * * So far as the Magnolia Petroleum Company is concerned, they exercise no control whatever over that road that I know of. So far as I know, the Magnolia refinery has not paid anything in the way of upkeep of that road from the refinery gate to the city limits. I do believe, however, that they did furnish the oil one time to oil that road."

C. Marshall, secretary of the Magnolia Petroleum Company, testified:

"The Magnolia Petroleum Company has not expended any money whatever in improving Madison street; neither has it furnished money, material, or labor on Madison street. I think about four years ago the city, who owns and controls that end of Madison street, made a proposition that if we would furnish the oil that they would put it on the road, for it was so dusty you could hardly travel it. They put some kind of material on one end of it at that time, but we had nothing to do with it at all. We made no charge for that oil; we merely gave it to them."

The foregoing facts are what the court based his findings of fact upon, apparently, and while the testimony is undisputed that Madison street, where the injury occurred, is a part of the main road from Beau-

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mont to Orange, the court refused to make a finding to that effect. It refutes the idea that Madison street was the road used exclusively by employees of the Magnolia Petroleum Company in going to and coming from their work. We are of opinion that the court erred in refusing to make this finding of fact so requested, and should have found the facts as requested.

The last assignment of error complains that the court erred in refusing to find as a matter of law that said injury was not received by said A. P. Dinkins while engaged in or about the furtherance of the affairs or business of the Magnolia Petroleum Company.

[6] Appellant requested the court to make the conclusion of law embodied in the foregoing assignment, but the court refused to so find, to which defendant excepted.

Section 5, part 2, Workmen's Compensation Law (General Laws 1917, c. 103, p. 283), provides:

"Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this act."

Honnold on Workmen's Compensation, vol. 1, pp. 167, 346, and 358.

The appellees base their right of recovery on the Workmen's Compensation Act alone, and they must show that they are entitled to compensation within the terms of the act.

[7] To come within the term "injury received in the course of employment," it must be shown that the injury originated in the work, and, further, that it was received by the employee while engaged in or about the furtherance of the affairs of the employer. If it be conceded that the injury originated in the work, it would still be necessary, in our opinion, to show that the employee was engaged in the furtherance of his employer's business.

In the case of Hills v. Blair, 182 Mich. 20, 148 N. W. 243, it is said:

"But it is shown here that deceased left the locality and sphere of his employment at a time when work was suspended, that he was doing nothing within scope of his employment, was not under the direction or control of his employer, and went away for purposes of his own, going where and as he pleased. Though he was traveling on his employer's premises when injured, he was then 950 feet away from where any duty in the line of his employment called him, and had selected his own route. But a short distance from where he left the carhouse he could have turned by a public street onto a wagon road along which he could have gone to his home, and a safe footpath was also available to him along the right of way. The custom of employees to travel along the railroad in going to and from their work, when it is shown that there was another and safe way which they might have taken, is not of controlling importance. At the same distance deceased was injured, from the place of employment, they would be at most licensees. In Caton v. Summerlee & M. I. & S. Co., 39 Scotch L. R. 762, it was held that the injury did not arise out of and in the course of the employment of a laborer who, at the conclusion of his day's work, was knocked down and killed by a passing engine 230 yards from where he had been working, while walking home along a private railway track belonging to his employer, which many of the men employed at the same place were in the habit of using in going to and from their work. The court there said: 'The deceased at the time of the accident had ceased his work, had left the place where he did it, and was on his way home. He had at the time no duty to fulfill to his master, and his master had no duty to fulfill towards him. The relation of master and servant had ended for the day, he having fulfilled his work and left the place where his work was being done.'"

In the instant case the deceased had left the locality and sphere of his employment, and was doing nothing within the scope of his employ-

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ment, and was not, at the time, under the direction or control of his employer, and went away, and was three-fourths of a mile from any duty in the line of his employment, and had selected his own route. He could have gone to his home some other route, as there were several ways together there besides the paved road, or he could have gone on a street car. As the statement of facts shows, the deceas. at the time of the accident had left the place of his employment, and was on his way home. He had at the time no duty to fulfill towards his employer. The relation of master and servant had ended for the day, he having fulfilled his work and left the place where his work was being done.

Under the undisputed testimony in this case, claimant has failed to show such relation of cause and effect between the accident and the duties of the party injured to his employer as will support a conclusion of law that the injury arose out of and in the course of employment A fair interpretation of the Compensation Act can only lead to one conclusion, that is, that Mr. Dinkins was not killed in the course of his employment.

There seems to be quite a lot of stress laid by appellees on the fact that Dinkins was killed in what is termed "the hazard zone of the refinery," because the collision occurred on the road which is principally traveled by employees going to and coming from their work. The point of injury, however, was within a few hundred feet of the Port Arthur road. (See map herewith attached.) This record discloses that the only time the Madison street road could be regarded as dangerous was in the afternoon at 5 o'clock. There was no attempt by the employer to dictate as to where Dinkins should leave, nor was there any attempt to control the manner in which he went to and from his work.

[8] After a careful consideration of all the facts in the case, reading carefully the statement of facts, and following closely the argument of counsel, we are led irresistibly to the conclusion that there was no liability in this case under the Compensation Act, and, as said by an eminent writer, "although the appellee's employment may continue for an interval after he has actually ceased working. yet there must come a time when he can no longer be said to be engaged in his employment in such . ay that an accident happening to him can be said to have arisen out of and in the course of his employment." There must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is to be determined by the facts themselves. We believe this is such a case, and therefore this assignment is sustained.

We desire to express our appreciation for the able and exhaustive brief filed by the appellant in this case, which has, indeed, been of great assistance to the court in determining the disposition of this case.

From what we have written, it follows that this cause must necessarily be reversed, and judgment rendered for appellant.

Additional Findings of Fact.

HIGHTOWER, C. J. The Court of Civil Appeal, at the request of the appellee makes the following findings of fact in this cause in addition to the facts set out and found in the opinion of the court, to wit:

(1) On September 30, 1917, the Magnolia Petroleum Company was a subscriber under the Employers' Liability and Workmen's Compensation Law of Texas, and on that date carried a policy of insurance under said law with the American Indemnity Company.

(2) On September 20, 1917, A. P. Dinkins was in the employ of the Magnolia Petroleum Company, and as such employee was covered by said policy of insurance against personal injuries and injuries resulting in death, if sustained in the course of his employment with the Magnolia Petroleum Company.

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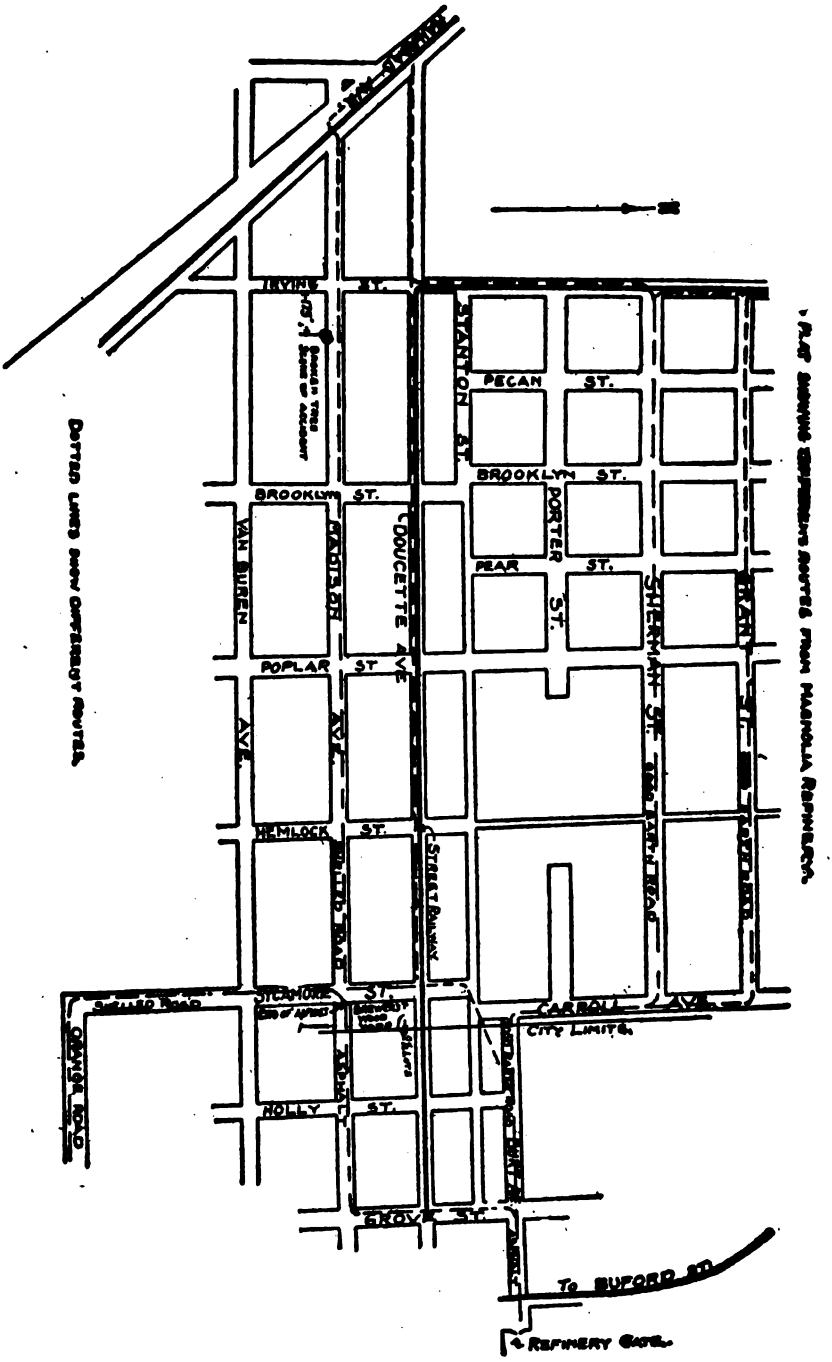

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(3) That on said date, and prior thereto, the Magnolia Petroleum Company had the legal right to insure its employees under the Texas Employers' Liability Law and the American Indemnity Company had the authority to write insurance thereunder and issue policies therefor, and the policy of insurance issued by the American Indemnity Company to the Magnolia Petroleum Company, insuring its employees under said liability law, including A. P. Dinkins, was legal, valid, and in force on September 30, 1917.

(4) The average weekly wages of the said A P. Dinkins was the sum of $28.75.

(5) Said A. P. Dinkins, deceased, left as his sole and legal beneficiaries his surviving widow, Mrs. A. P. Dinkins, and two minor children, Jack Dinkins and Emma Marie Dinkins.

(6) On September 30, 1917, the Magnolia Petroleum Company employed in its refinery at Beaumont 1,600 persons, and operated three shifts per day, to wit, from 12 at night to 8 in the morning, from 8 in the morning until 4 in the afternoon, and from 4 in the afternoon until 12 at night. A. P. Dinkins was in the shift that worked from 4 in the afternoon until 12 at night, and on that shift 300 persons were involved, 150 going off work and 150 coming on to work at about 12 o'clock at night. About 5 per cent of the employees of the refinery came to and from their work in automobiles, and quite a number came and went on bicycles and motorcycles. All employees at the refinery were required to enter and leave the refinery at the big entrance gate, where a watchman is stationed to register the employees and let them in and out, to and from the premises. There is only one road leading to said refinery gate or entrance; this road leaves the Beaumont-Port Arthur road at Madison street, and extends along Madison street, Grove street, and Burt avenue to the refinery gate. This road is graded up and paved, and, in addition to regular taxes, the Magnolia Petroleum Company contributed both labor and material at its own expense in the construction of this paved road. This is the only road leading to the refinery which is fit or suitable for automobiles, motorcycles, and bicycles, and is the only road used by the employees of the Magnolia Petroleum Company at said refinery who go to and from their work in automobiles and other vehicles. Frank Ellis was on September 30, 1917, an employe of the Magnolia Petroleum Company, and was on the shift which began work at 12 o'clock that night. A. P. Dinkins had quit work for the day, registered out at the refinery gate, and was going home riding on a motorcycle to secure rest and refreshment, and was traveling on said paved road leading from the refinery gate to the Port Arthur road. Said Frank Ellis was traveling on said road in his automobile to report for work, and while said Dinkins and said Ellis were traveling on said road as aforesaid they accidentally collided, about three-fourths of a mile from the refinery gate, and said A. P. Dinkins was killed as a result of the collision.

Said paved road leading from the refinery gate to the Port Arthur road is about one mile in length, and there are no paved roads or streets branching out or leaving this road leading to the city of Beaumont or its suburbs between the refinery gate and the Port Arthur road.

The accident in which A. P. Dinkins was injured occurred on one of the public roads of Jefferson county, and occurred about three-fourths of a mile from the Magnolia refinery, or the place where Dinkins was employed.

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COURT OF CIVIL APPEALS OF TEXAS.

FT. WORTH.

U. S. FIDELITY & GUARANTY CO.

v.

DAVIS. (No. 9061)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ATTEMPTED REPUDIATION AND AFFIRMANCE OF AWARD.

An injured servant could not, under Workmen's Compensation Act, pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44), repudiate and abrogate the ruling of the Industrial Accident Board awarding compensation, and at the same time treat it as effective and binding on the employer, and seek under section 5a to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with the mandates of the board.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New vol. 7A Key-No. Series.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROVISION OF JUDGMENT FOR EXECUTIONS.

In a workmen's compensation case, the judgment should have provided for the issuance of executions to collect the various installments of compensation awarded as they matured, since clerk cannot be made the judge to determine what character of process he shall issue.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FORM OF JUDGMENT.

In a workmen's compensation case, the form of judgment proposed by the servant, embodying the right and power of the court to review it, and diminish, increase, or terminate the liability of the insurer in accordance with part 1, § 12d, of the Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—25), with the right in the insurer at any time to redeem its entire liability by payment of a lump sum on agreement with the servant, with the approval of the Industrial Accident Board, in accordance with part 1, § 15 (article 5246—33), *held* proper, with modification of provisions as to executions and the approval of the trial court of any lump sum settlement.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POWER OF COURT OVER AWARD—LUMP SUM SETTLEMENT.

In view of Workmen's Compensation Act, pt. 2 § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44), a court trying a workmen's compensation case by implication has the power given the Industrial Accident Board by part 1, § 15 (article 5246—33), to approve any agreed lump sum settlement, and the power given it by section 12d (article 5246—25)

*Decision rendered, March 22, 1919. Rehearing denied April 26, 1919 212 S. W. Rep. 239.

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to review, terminate, diminish, or increase an award for compensation made.

(For other cases, see Master and Servant, Dec. Dig. § 408.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BASIS OF AWARD—AVERAGE WEEKLY WAGES.

Where an injured servant had worked in the employment in which he was engaged when injured for several years before injury, under Workmen's Compensation Act, pt. 4, § 1, subsec. 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82), his average weekly wages, and not the average weekly wages of other persons similarly engaged, were the proper basis for determining the amount of compensation.

(For other cases, see Master and Servant, Dec. Dig. § 385[5].)

Appeal from District Court, Denton County; John Speer, Judge.

Proceedings for compensation under the Workmen's Compensation Act by W. W. Davis against the J. W. Thompson Construction Company, the employer, and the United States Fidelity & Guaranty Company, the insurer. Compensation was awarded, and the insurer appeals. Judgment reformed and affirmed.

Seay & Seay, of Dallas, for appellant.
Ed I. Key, of Denton, for appellee.

DUNKLIN, J. W. W. Davis was an employe of the J. W. Thompson Construction Company, which was a subscriber to the Workmen's Compensation Act, appearing in full in the acts of the Legislature of 1917, p. 269 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91), and held a policy of insurance in the United States Fidelity & Guaranty Company, issued according to the requirements of the act, and which made the insurer liable for compensation to the employes of the Thompson Construction Company for injuries sustained by them while engaged in such employment. On February 1, 1918, the Industrial Accident Board, with whom Davis had filed a claim for compensation, awarded him compensation to be paid by the insurer in the sum of $15 per week for the injury which the board found had totally incapacitated him for work, said weekly allowance to continue during the existence of such total incapacity, not to exceed, however, the period of 401 weeks, and subject to modification or termination in accordance with the provisions of the act.

Davis had attempted to procure an order allowing him compensation in a lump sum rather than in weekly installments in accordance with the provisions of section 15, pt. 1, p. 280, of the act, upon the plea that, as he had a wife and three small children to support, the oldest being only 12 years of age, and as he was wholly incapacitated to work himself, a manifest hardship and an injustice would be done him if his compensation was fixed at even the maximum weekly allowance authorized by the act. And when that request was refused he, within 20 days after that decision by the Industrial Accident Board, gave notice to the board and to the insurer that he would not abide by said ruling, and immediately instituted this suit to recover compensation under the act, as was his right to do under the provision of section 5, pt. 2, p. 283, of the act. In his petition, filed in this suit, he sought to recover compensation in a lump sum as he did before the Accident Board, and on the same grounds. In the alternative he prayed that, if he was not entitled to a lump sum settlement, then he should be awarded compensation in the sum of $15 per week for 389 weeks. Plaintiff further alleged that he had presented his claim to the Industrial Accident Board, and that said board had awarded him compensation which the

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defendant had refused to pay in accordance with the terms of that decision, although defendant was duly notified of plaintiff's dire distress and urgent need of such compensation for the support of his family.

In both counts of his petition plaintiff sought to recover exemplary damages in the sum of $4,000, as well as actual damages, which in each count was fixed at the sum of $6,000; the claim for exemplary damages being predicated upon an allegation of the construction company's "negligence and willful disregard for this plaintiff's rights in causing the said injuries."

It was further alleged that plaintiff has the right to a lump sum settlement by reason of the fact that the insurer had, without justifiable cause, failed to pay the weekly allowances made by the Accident Board as they matured.

Judgment was rendered decreeing a recovery by the plaintiff of $22 per week for 265 weeks, after allowing the defendant credit for $180 which it had already paid prior to the trial under the ruling of the Industrial Accident Board. But one-third of the recovery was awarded to plaintiff's attorney for his services in prosecuting the suit. From that judgment the defendant has prosecuted this appeal.

The trial was before a jury, who returned a verdict, such as is indicated by the judgment, upon a general charge submitted to them by the trial judge.

[1] By section 5a, pt. 2, p. 284, of the act it is provided that, should the insurer, without justifiable cause, refuse to make prompt payment of the assessments decreed by the Industrial Accident Board as the same mature, then the injured employe or his beneficiary shall have the right to mature the entire claim and to institute suit thereon to collect the full amount of the award, together with 12 per cent. penalty and attorney's fees. While plaintiff did allege in his petition such a failure on the part of defendant, coupled with an allegation of his right thereby to mature the entire amount of his claim, yet the trial judge did not submit to the jury the issue whether or not the defendant had, "without justifiable cause," refused to pay said awards, and no complaint is made by the appellee here of the failure of the court to submit that issue. Furthermore, as shown by plaintiff's petition, he was not willing to abide by the decision of the Industrial Accident Board, and instituted this suit under the provisions of section 5, pt. 2, p. 283, of the act, according to the terms of which the decision of the board was thereby abrogated, and exclusive jurisdiction to determine the controversy was vested in the court in which the suit was instituted. Plaintiff could not thus repudiate and abrogate the ruling of the Industrial Accident Board, and at the same time treat it as effective and binding upon the defendant and seek to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with mandates of the board. The only basis for a verdict in plaintiff's favor for a lump sum settlement submitted in the court's charge was the issue whether or not a manifest hardship and injury would result to the plaintiff if he were not allowed that relief in accordance with the provisions of section 15, pt. 1, p. 280, of the act, and no complaint was made by the plaintiff of the charge of the court in thus limiting his right to recover damages in a lump sum to that theory of his pleading.

In various sections of part 1 of the act it is provided that the Industrial Accident Board shall allow compensation for the injuries received by an employe of a subscriber to the act, and the rules for computing the compensation are prescribed. Section 10, pt. 1, p. 274, of the act reads as follows:

"While the incapacity for work resulting from injury is total, the association shall pay the injured employe a weekly compensation equal to sixty per cent. of his average weekly wages, but not more than $15.00

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nor less than $5.00, and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury."

Section 12d, pt. 1, p. 278, of the act reads as follows:

"Upon its own motion or upon the application of any person interested showing a change of condition, mistake, or fraud, the board at any time within the compensation period may review any award or order, ending, diminishing or increasing compensation previously awarded within the maximum and minimum provided in this act, or change or revoke its previous order sending immediately to the parties a copy of its subsequent order or award. Review under this section shall be only upon notice to the parties interested."

Section 15, pt. 1, p. 280, of the act provides:

"In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board."

The court did not submit the issue of a partial incapacity to labor, resulting from plaintiff's injury, total incapacity being the only incapacity submitted, and the verdict of the jury, construed in the light of the charge, indicates a finding of a permanent total incapacity to labor by reason of plaintiff's injuries, since he was allowed a maximum compensation equivalent to $15 per week for 401 weeks by increasing the weekly compensation with a corresponding decrease of the number of weeks in accordance with section 15a, pt. 1, p. 281, of the act, which was given to the jury by the court in his charge, after crediting the defendant with the payment of 12 weekly installments of $15 each, or $180 in the aggregate, already paid.

Appellant has cited the Southern Surety Co. v. Stubbs, 199 S. W. 343, and Southwestern Surety Ins. Co. v. Curtis, 200 S. W. 1162, announcing the rule that a judgment cannot be rendered upon an obligation which has not matured, and upon these authorities it is insisted that the judgment in the trial court was erroneous in that execution was awarded to collect the weekly installments to mature in the future. Appellant has also cited the provisions of section 5, pt. 2, p. 283, of the act wherein it is said that, if either party shall be dissatisfied with the final ruling of the Industrial Accident Board, and shall institute suit to recover for the injury, in accordance with the terms of that section, "the rights and liability of the parties thereto shall be determined by the provisions of this act."

After the verdict was returned appellant filed a motion that judgment be entered in accordance with a form tendered which embodied in it the right and power of the court to review the same and diminish, increase, or terminate the liability of the defendant in accordance with the provisions of section 12d, copied above, with the right in the defendant at any time to redeem its entire liability by payment of a lump sum upon agreement with plaintiff thereto and with the approval of the Industrial Accident Board in accordance with the provisions of section 15, pt. 1, p. 280, of the act. But the proposed form concluded with this provision:

"To enforce the above judgment all process necessary, or permitted by law to enforce this judgment, or to keep the same in existence may be issued."

[2, 3] It is a familiar rule that the clerk of the court cannot be made the judge to determine what character of process he shall issue, and in order to conform to that rule the judgment should have provided for the issuance of executions to collect the various installments of compensation awarded as they shall mature. And we are of the opinion

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that the proposed form of judgment with that change and with the further change that any future agreed lump sum settlement shall be with the approval of the trial court should have been adopted.

Such a judgment, perhaps, would be contrary to the general rule that a recovery cannot be decreed upon an obligation which has not matured, but it will be necessary to depart from that rule in order to give effect to the provisions of the Compensation Act referred to already. At all events, appellant is in no position to complain of such a judgment, since it has invoked the entry of the same.

[4, 5] The act does not specifically vest in a court trying such a case as this the power given to the Industrial Accident Board by section 15, pt. 1, copied above, to approve any agreed lump sum settlement, nor the power given that board by section 12d, copied above, to review, terminate, diminish, or increase an award of compensation previously made, but we are of the opinion that the court is, by implication, vested with such power, in view of the provision of section 5, pt. 2, p. 283, of the act, to the effect that, "whenever such a suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this act." We do not think that it was the intention of the Legislature to vest in the Industrial Accident Board the power to review a judgment rendered by a court of competent jurisdiction of the issues involved in a suit like the present one in violation of the general rule that, where a court once acquires jurisdiction over a controversy, it retains such jurisdiction for all purposes necessary to a final determination of the rights of the parties.

[6] By another assignment appellant complains of the refusal of its requested instruction to the effect that the plaintiff was entitled to receive only 60 per cent. of his average weekly wages during the time he was totally incapacitated for work, in no event to exceed $15 per week nor less than $5 per week, and that such average weekly wages should be computed upon the basis of the average annual wages of other employes working in the same class of work, if the jury should find that plaintiff had not worked in the employment in which he was engaged at the time of his injury during substantially the whole of the year next preceding his injury.

This assignment is overruled because the proof was uncontroverted that plaintiff worked in the employment in which he was engaged at the time of his injury for several years prior to his injury, and, that being true, his average weekly wages, and not the average weekly wages of other persons similarly engaged, was the proper basis for determining the amount of compensation to be awarded to him. See subsection 1 of section 1, pt. 4, p. 291, of the act. Furthermore, no evidence has been pointed out by appellant, and we have found none, to show such average weekly wages of such other employes for the preceding year.

Accordingly the judgment of the trial court will be reformed as indicated above, and as so reformed it will be in all things affirmed; and this decision will be certified to the trial court, with instructions to retain the suit upon its docket for the purpose of further proceedings therein in the event of the happening of any of the contingencies specified in the judgment for reviewing the same and ending, diminishing, or increasing the amount of the award so decreed to the plaintiff. Costs of appeal are taxed against the appellant.

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COURT OF CIVIL APPEALS OF TEXAS.

GALVESTON.

AMERICAN INDEMNITY CO.

v.

ZYLONI ET AL. (No. 7551.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BINDING FORCE OF ORDER OF ACCIDENT BOARD—RIGHT TO APPEAL.

A workmen's compensation insurer which voluntarily contested the claim of the deceased servant's brothers before the Industrial Accident Board was not bound by the board's final award, and has an appeal therefrom where the board did not direct payment of the award to the brothers or find them in fact beneficiaries, but merely fixed the amount due, and ordered payment to the "legal beneficiaries," and where there was no express agreement the parties should be bound by action of the board.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½].)

ON MOTION FOR REHEARING

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BROTHERS AS "BENEFICIARIES."

The brothers of a deceased servant were "beneficiaries" within the meaning of Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St 1914, art. 5246kk).

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Beneficiary.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF INJURY AND CLAIM.

Brothers of deceased servant, his beneficiaries, through the attorney for the elder, *held* to have given the notice of injury and made the claim for compensation required by Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp), though the first letter of the attorneys in relation to the matter was sent to the employer, and they were referred to the insurer, to which they wrote inclosing a copy of their first communication.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from District Court, Galveston County: Clay S. Briggs, Judge.

Suit by John Zyloni and another against the American Indemnity Company to recover compensation under the Workmen's Compensation Act. From judgment for plaintiffs, defendant appeals. Affirmed.

Terry, Cavin & Mills, of Galveston, for appellant.

Cole & Cole, of Houston, and McDonald & Wayman, of Galveston, for appellees.

*Decision rendered, March 29, 1918. On Motion for Rehearing, March 21, 1919. Appellant's Motion for Rehearing Denied April 17, 1919. 212 S. W. Rep. 183.

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GRAVES, J. This concededly correct statement of the nature and result of the suit is taken from appellant's brief:

"This suit was brought by John Zyloni and Kazmiers Zyloni, the brothers of Peter Zyloni, to recover for compensation alleged to be due them under the Workmen's Compensation Act of Texas of 1913 (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h—5246zzzz]). The appellees were residents of Erie county, Pa. Peter Zyloni met his death while in the employ of James Stewart & Co., which was a 'subscriber' under the Compensation Act of 1913, and appellant was the 'association' writing the insurance guaranteeing the payment of the compensation to the representatives of the deceased employes of James Stewart & Co. Peter Zyloni received the injuries which resulted in his death while in the course of his employment with James Stewart & Co. The court below rendered judgment in favor of appellees against appellant for $801.36, being the amount of compensation which he found appellees were entitled to up to the date of the judgment, and provided by his judgment that it should be without prejudice to the right of appellees to sue for installments of compensation which might become due after the date of the judgment. From this judgment appellant has duly perfected its appeal."

By its first two assignments appellant attacks the trial court's conclusion of both fact and law that, having voluntarily contested this claim before the Industrial Accident Board, without indicating any intention not to abide by the board's final award, it was bound by and had no appeal therefrom.

[1] In the view we take of the case, there was neither res adjudicata in that board's action upon nor estoppel under its agreement preventing appellant from further contesting the question whether appellees were legal beneficiaries of their deceased brother, for two reasons: (1) The Industrial Accident Board did not direct payment of its award to the appellees, or find them in fact to be beneficiaries, but merely fixed the amount due, and ordered appellant to pay that sum to "the legal beneficiaries of Peter Zyloni, deceased," without naming them; (2) as found by the trial court, "there was no express agreement that the parties would be bound by the action of said board. Nothing was said by either party prior to said hearing as to whether they would or would not be bound by the decision of such board. After the making of said award, defendant notified plaintiffs that it would not be bound by said award, whereupon plaintiffs filed suit."

We therefore think the trial court was not without authority to determine in this suit whether or not appellees were legal beneficiaries of Peter Zyloni, as it did do notwithstanding the conclusion complained of in these assignments, but that it erred in holding them to be such.

In other words, we sustain the contention of appellant, presented under its third, fourth, and fifth assignments, that appellees, being the brothers of the deceased employe, came within none of the classes entitled to receive benefits under the Compensation Law.

This conclusion determines the case, and renders wholly academic any further question as to whether or not they gave the notice of injury and made the claim for compensation required by that statute (article 5246ppp). It accordingly becomes unnecessary to pass upon assignments 6 to 10, inclusive, relating to that issue.

Appellees, with much force and ability, insist that, under our Compensation Law of 1913, the beneficiaries to whom the right of action survives are the heirs of the deceased under the statutes of descent and distribution (article 2461 et seq.), and they, being the sole heirs under these statutes in this instance, are entitled to the compensation awarded by the act. As a part of their discussion they have filed here copies of an able argument presented by some of their attorneys and others to the Supreme Court in the case of Vaughan et al. v. S. W. Ins. Co., now pending in that court upon writ of error to the Court of Civil Appeals for the Ninth District. See 206 S. W. 920. We have read

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it with much interest, but are yet unable, as we have heretofore been, to yield to the view it so persuasively presents.

This court, in the case of Cole v. Mallory Steamship Co., 197 S. W. 326, followed the prior holding of the Court of Civil Appeals for the Ninth District at Beaumont that the Compensation Law did not enlarge the beneficiaries named in the pre-existing death injury statute, and therefore, since the surviving husband, wife, children, and parents of the deceased were made sole beneficiaries under the latter, brothers could not be such under the former. The matter is fully discussed in the Cole case, and in the Vaughan Case (Vaughan et al. v. S. W. S. Ins. Co., 195 S. W. 261), which it follows, and in which the Supreme Court has granted a writ of error.

So far as we are advised, the two cases mentioned are the only ones in which the question has been directly decided by the appellate courts of Texas. In these circumstances while we refrain from extended further discussion of it here, recurrence is made to the case of Smith v. So. Surety Co., 193 S. W. 204, decided by this court prior to both the Vaughan and Cole Cases. In that case it was held that, by the terms of the Compensation Act, its benefits vest absolutely in the legal beneficiaries of the deceased immediately upon his death, and not in his estate; hence the administrator of his estate, having no interest in the fund, could not maintain an action to recover it. While the point now before us was not then involved, and although the term "heirs" was unintentionally used for "legal beneficiaries" which was later corrected in the Cole Case, the conclusion reached in the Smith Case that the fund created by the operation of the compensation statute vested at once upon the death of the insured, after the manner of other insurance, in his legal beneficiaries, is likewise our continuing conception of the general purpose and effect of that legislation; and if that was the Legislature's purpose in so providing this new fund and terming it "compensation" to some particular class of persons then in mind for the loss of benefits they would otherwise have received from the deceased there could not at the same time have been the intention to also make it a part of his estate and descendable as his other personal property. The one disposition excludes the other. Moreover, such an estate would not only be subject to administration, but would pass to the heirs of the deceased chargeable with his debts, whereas by the express terms of the Compensation Act creditors of the deceased employe cannot reach the money thereby provided, except in instances where there are no legal beneficiaries at all.

That this character of estate was created, however, seems to be the contention of appellees, and upon such foundation largely is built their argument that the statutes of descent and distribution must be looked to in determining who are the beneficiaries.

It may be that in a theoretical or philosophical sense the fund intended to be created by this new system was in a certain way regarded as belonging to the deceased, by considering part of his currently earned wages as being withheld until after his death, and then paid in installments for a fixed period; in other words, by applying practically to economic affairs the spiritual principle that, "though dead, his works live after him," and so indulging the fiction that he was still earning money.

We cannot think that either the purpose or effect of the Act. It seems to us, as to beneficiaries, the Compensation Law, subject only to the contingencies therein specified, was merely intended to take the place of our death injury statute, and that the benefits of the former were expressly created for the personal use and benefit of those named in the latter, just as, in the absence of the new system, would have passed the right under the death injury statute to damages resulting from negligence. Nor does the provision that the compensation "shall be distributed according to the law providing for the distribution of other property of the deceased" inveigh against this conclusion, we think,

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because that merely directs or explains what divided interest each of the beneficiaries shall have in the fund, thereby prescribing a method of apportioning it among members of a class otherwise designated.

But, if the view indicated be at all permissible, it is only theorizing as to the origin or economic basis of the compensation idea, as distinguished from liability resulting from negligence, and cannot be so applied to the result and effect of what was actually enacted by our statute on the subject as to defeat the evident purpose of its direct and plain provisions; that is, to compensate those expressly designated for loss resulting to them from the employe's death. It follows that, in our view, the judgment below was fundamentally erroneous in decreeing that brothers might recover the benefits in question, and must accordingly be reversed and here rendered for appellant, and that order has been entered.

Reversed and rendered.

On Motion for Rehearing

[2] Under a holding that brothers were not beneficiaries within the meaning of the Workmen's Compensation Act of 1913 (Vernon's Sayles' Statutes, art. 5246kk), this cause was originally reversed and rendered in appellant's favor. The question having in the meantime reached the Supreme Court, in the case of Vaughan et al. v. S. W. S. Ins. Co., action upon the motion for rehearing filed by appellees was postponed to await a disposition of the Vaughan Case. That has since been made; the Supreme Court, in an opinion rendered December 11, 1918 (206 S. W. 920), having decided the matter adversely to our view. Accordingly, in recognition of superior authority, it is now held that the appellees did come within the terms of the statute referred to.

[3] The further question of whether or not they gave the notice of injury and made the claim for compensation required by article 5246ppp of the same act was not passed upon before, because rendered immaterial by the conclusion that they could not in any event become beneficiaries.

Now, however, that matter must be determined. The insistence that no such notice was given nor claim made is presented under assignments 6 to 10, inclusive, of appellant's brief. After careful consideration of them, we conclude that they cannot prevail, and that the trial court did not err in holding the letter of September 8, 1915, from Brooks and English to James Stewart & Co. to be a sufficient notice and claim under the provisions of the last-mentioned section of the act—that is, article 5246ppp—which requires the notice to be given as soon as practicable after the injury, and the claim for compensation to be made within six months after the death of the employe. The undisputed facts about and following the letter are reflected in these findings of the court:

"Claim for compensation was made upon James Stewart & Co., the subscriber, within six months after the death of Peter Zyloni, as required by the Compensation Act of Texas, said claim being embodied in a letter dated September 8, 1915, written by Messrs. Brooks & English, attorneys at law, of Erie, Pa., a copy of which is as follows:

"'September 8, 1915.

"'James Stewart & Co., Care S. A. R. Ry. Company, Galveston, Texas—Gentlemen: On March 26, 1915, at about 9:30 a. m., as we are informed, P. Zyloni, or Pete Zeurloines, while in your employ was killed, his neck being broken by the falling upon him of a gin pole. From the evidence which has been furnished us and as offered at the coroner's inquest, this appears to be a case of liability on your part. A friend of the deceased, who is familiar with the facts in the case, is very anxious to have the brother, who resides in Erie, put his case in the hands of an attorney in Galveston. Realizing that

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perhaps you have an insurance company we are writing to ascertain whether you or the company desire to adjust this matter without litigation, and if so, to give you an opportunity to do it through us as attorneys for the estate of the deceased.

"'Unless we hear from you, or some one representing you within ten days, we take it for granted you do not care to negotiate.

"'Yours very truly.'

"On September 14, 1915, the said subscriber, James Stewart & Co., wrote the said Brooks & English, acknowledging receipt of their letter of September 8th. On September 27, 1915, Brooks & English wrote a letter to the American Indemnity Company reading as follows: 'On September 8th, we wrote a letter to James Stewart & Co., a copy of which is inclosed, and they have referred us to you for adjustment of same.'

"This letter was received by the American Indemnity Company on September 30, 1915. On September 30, 1915, defendant wrote and mailed to Brooks & English (and which they received) a letter, a copy of which is as follows:

"'Galveston, Texas, September 30, 1915.

"'Messrs. Brooks & English, Attorneys at Law, Erie, Pennsylvania—Gentlemen: Re LC—3210 Peter Zyloni v. James Stewart & Co. We have for acknowledgment your favor of the 27th inst., transmitting copy of letter of the 8th instant, addressed to Messrs. James Stewart & Co., at Galveston, concerning the injury and death of the above party. You are correct in your statement that Zyloni was killed while in the employ of James Stewart & Co., but we do not believe you are correct in your belief that there is liability on the part of our policy holder.

"'Under the provisions of our policy and the law under which it was written we are agreeable to handling the claim with you, but before giving you any definite advices, we will request that you kindly advise us if there are any other surviving relatives than the brother to whom you refer. At the time of the death an effort was made to get in touch with this party's brother, who was then in Shenandoah, Pa.

"'If you can consistently do so, please let us have the desired information and upon receipt of same we shall be glad to write you further.

"'Very truly yours,

"'J. H. Booth, Claims Superintendent.'

"On October 11, 1915, Brooks & English replied to such letter of defendant, giving the information requested by defendant as to identity of relatives of Peter Zyloni, reading as follows: 'Replying to your letter of the 30th ultimo, will say that the only relative of Cassmer Zyloni, whom we represent, is a brother, John Zyloni, living at Scranton, Pennsylvania. My client, however, is the older one and would be entitled to take out letters of administration, but if a satisfactory settlement with these two brothers could be agreed upon their release would be sufficient.'

"On October 14, 1915, defendant acknowledged receipt of the Brooks & English letter of the 11th inst., thanking them for the information contained therein, and for the first time declining to entertain any claim on account of the death of Peter Zyloni, asserting that Zyloni was killed March 26, 1915, and that no person had made claim for compensation as provided by the Texas Employers' Liability Act within six months after the date of death, and asserting that any claim was now barred."

The main assault upon the sufficiency of this letter as constituting compliance with the statute lies in the contention that, since it was neither sent nor presented to appellant direct, and nowhere in its body purported to claim compensation, it could not be construed to be such, nor would it as notice inure to the benefit of appellees, because it did not emanate immediately from themselves. Neither objection is thought to be tenable.

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Under the authorities generally, so far as we are advised, a claim for compensation does not have to be preferred in any particularly set or formal manner. It is said in Glass Workmen's Compensation, subd. E, p. 85:

"'Claim for compensation' means, not the institution of proceedings before the tribunal by which the compensation is to be assessed, but a notice of claim of compensation sent to the workman's employer. The claim need not be for a definite sum nor in writing. A request for arbitration is a sufficient 'claim for compensation,' and a letter containing a notice of the accident and a description of the injuries and a request to know what compensation would be allowed, and a further request for an immediate answer, is a claim for compensation. So a document wherein a workman made a claim for compensation for an injury received upon a designated day, 'as per claim in the Employers' Liability Act,' is a valid claim."

See 1 Honnold's Workmen's Compensation, § 212, pp. 762, 763.

As to the matter of notice, the undisputed facts here showed not only that both the employer and the insurer knew of the employe's death within two days thereafter, but that the insurer gave notice thereof to his relatives. In those circumstances, it would seem foolish, or at least a useless thing, to nevertheless require a further and direct notice of that same occurrence from his beneficiaries to the insurer before they could be said to be in position to claim the compensation provided. We do not think this statute should be so construed, concluding rather that notice from attorneys in the manner shown in the Brooks & English letter would be sufficient.

We do not find it necessary to determine the question of whether the finding of the Industrial Accident Board was res adjudicata of the whole controversy, and do not do so, because the trial court independently found all the facts, which are not as such anywhere attacked, entitling appellees to the judgment obtained, as follows:

"Apart, however, from said decision and award of said board and independent thereof, I find that the plaintiffs are entitled as the legal beneficiaries of said Peter Zyloni, deceased, to have and recover of and from the defendant said compensation for the death of said Peter Zyloni the sum of $7.20 per week, the same being 60 per cent. of the average weekly wage of the said Peter Zyloni, for the full period of 360 weeks from and after March 26, 1915, such compensation being payable in the sum of $756 principal and $45.36 interest, making in all $801.36, being the total weekly compensation which has accrued up to this time, and the further compensation, hereafter to be payable each week, at the rate of $7.20 per week until the expiration of the full period of 360 weeks from and after March 26, 1915."

Since, therefore, this recovery may rest upon the separate determination of the necessary facts by the court below, it becomes unnecessary to decide whether or not that court was under the duty of doing what the record thus affirmatively shows it did do, that is, of accepting as final and binding the conclusions of the Accident Board, without itself going into these fact issues. This deduction applies with like effect to the court's other and antecedent conclusion that appellees were in fact the legal beneficiaries of their deceased brother, that matter also having been in the quoted findings disposed of independently of the Board's action; so that, even if the Accident Board had specifically adjudged appellees to be the legal beneficiaries, which our original opinion shows was not done, there would still be no necessity of a holding upon the question of whether or not its decree in that respect was res adjudicata. If any expressions in our former opinion may be taken as indicating a contrary view, they are accordingly now so modified as to accord with the conclusion here stated.

The motion for rehearing is granted, our former judgment set aside, and that of the court below is in all things affirmed.

Motion for rehearing granted, and trial court's judgment affirmed.

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UNITED STATES SUPREME COURT.

ARIZONA COPPER CO., LIMITED,

v.

HAMMER. (No. 20.)

SAME

v.

BRAY. (No. 21.)

RAY CONSOL. COPPER CO.

v.

VEAZEY. (No. 232.)

INSPIRATION CONSOL. COPPER CO.

v.

MENDEZ. (No. 332.)

SUPERIOR & PITTSBURG COPPER CO.

v.

TOMICH. (No. 334.)*

1. CONSTITUTIONAL LAW—PROVINCE OF COURTS—WISDOM OF LEGISLATIVE ACTS.

Attacks on the Arizona Employers' Liability Act, which with the Workmen's Compulsory Compensation Law provides an extensive scheme for compensating injured employees, based on the novelty, wisdom and policy of the acts, cannot be considered by the courts; that being a matter for the Legislature.

(For other cases, see Constitutional Law, Dec. Dig. § 70[3].)

2. MASTER AND SERVANT—REGULATION—LIABILITY FOR INJURIES TO SERVANT.

The rules of law governing employers' responsibility for injuries to employees arising in course of the employment may be altered by the Legislature in public interest; such rules as the fellow servant rule and the doctrine of assumption of risk being subject to change.

(For other cases, see Master and Servant, Dec. Dig. § 11.)

3. CONSTITUTIONAL LAW—VESTED RIGIHTS—WHAT CONSTITUTE.

No person has a vested right, entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employee.

(For other cases, see Constitutional Law, Dec. Dig. § 105.)

*Nos. 20 and 21, Argued Jan. 25, 1918. 232, Argued Jan. 28, 1918. 332, Argued April 25, 1919 334, Submitted April 24, 1919. Decided June 9, 1919.

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4. MASTER AND SERVANT—REGULATION—LIABILITY FOR INJURIES.

If the changes are not arbitrary and unreasonable, liability may be imposed on an employer without fault for injury or death of an employee arising in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 11.)

5. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS —EMPLOYERS' LIABILITY ACT.

The Arizona Employers' Liability Act, enacted pursuant to Const. Ariz. art. 18, which designated specified employments as inherently dangerous, and imposed liability on the employer for accidental injury or death of employees not caused by their own negligence, is not, though it changed the common-law rules as to liability of masters, invalid, as denying to them the equal protection of the law, in violation of Const. Amend. 14.

(For other cases, see Constitutional Law, Dec. Dig. § 245.)

6. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EMPLOYERS' LIABILITY.

In view of the interest of the state in the welfare of its citizens, the Arizona Employers' Liability Act, which makes employers in specified occupations designated as inherently dangerous, liable for the accidental injury or death of servants not themselves negligent, regardless of the employer's fault, is not invalid, as depriving employers of their property without due process of law, in violation of Const. Amend. 14.

(For other cases, see Constitutional Law, Dec. Dig. § 301.)

7. CONSTITUTIONAL LAW—UNCONSTITUTIONALITY OF STATUTE—BURDEN OF PROOF.

Those attacking the Arizona Employers' Liability Act on the ground that it is in violation of Const. Amend. 14, have the burden of demonstrating that it is clearly unreasonable and arbitrary, so as to bring it within the constitutional inhibitions.

(For other cases, Constitutional Law, Dec. Dig. § 48.)

8. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY WITHOUT.

The Arizona Employers' Liability Act, providing that employees in occupations designated as inherently dangerous, who are injured without their own negligence, may recover the proximate damages resulting from the injury, to be assessed by a jury, is not invalid, as depriving employers of their property without due process of law, on the ground that the damages were unlimited, for the act, as construed by the highest Arizona court, limited recovery to the actual damages, and the fact that damages were to be assessed by a jury is certainly no ground for asserting a denial of due process of law.

(For other cases, see Constitutional Law, Dec. Dig. § 301.)

9. CONSTITUTIONAL LAW—RIGHT TO RAISE CONSTITUTIONAL QUESTION.

An employer cannot question the validity of the Arizona Employers' Liability Act, on the ground that damages awarded an injured employee, or the representatives of a deceased employee, are not distributed by installment payments.

(For other cases, see Constitutional Law, Dec. Dig. § 42.)

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10. CONSTITUTIONAL LAW—PERSONS ENTITLED TO RAISE.

The constitutionality of the Arizona Employers' Liability Act is not open to attack on grounds that might possibly arise, but which do not affect the employers who were questioning its constitutionality.

(For other cases, see Constitutional Law, Dec. Dig. § 42.)

11. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—POSSIBILITY OF IMPROPER CONSTRUCTION.

As the Arizona Employers' Liability Act, making employers liable though without fault, imposes liability only for accidental injuries attributable to inherent dangers of the occupation, it cannot be deemed unconstitutional, on the theory that it might be extended by construction to nonhazardous industries, for it is obvious that employers in such industries are in little danger from the act.

(For other cases, see Constitutional Law, Dec. Dig. § 38.)

12. CONSTITUTIONAL LAW—CONSTITUTIONALITY OF STATUTE—POSSIBILITY OF IMPROPER CONSTRUCTION BY STATE COURTS.

As the highest court of Arizona has construed the Employers' Liability Act to limit recovery to compensatory damages, it cannot be assumed, where its constitutionality was questioned in the federal Supreme Court, that its benefits might be extended in case of death claims to those not nearly related to or dependent on the deceased employee, etc., for it would be improper for the Supreme Court to assume that the state court would place such a construction on the act as to render it obnoxious to the federal Constitution.

(For other cases, see Constitutional Law, Dec. Dig. § 38.)

13. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—ELECTION OF REMEDIES.

Though an Arizona employee, who suffers injuries, has an election, and may proceed either under the Employers' Liability Act, if he is not guilty of negligence, or, if guilty, under the Workmen's Compulsory Compensation Law, or, if the employer is at fault, under the common law, relieved of certain defenses, such right of election does not deprive employers of their property without due process of law, or deny them the equal protection of the law, in violation of Const. Amend. 14.

(For other cases, see Constitutional Law, Dec. Dig. §§ 249, 305.)

14. MASTER AND SERVANT—VALIDITY OF REGULATIONS—LIABILITY ACT.

That the Arizona Employers' Liability Act allows compensation to be made as in tort cases, so that an injured workman may recover for pain suffered, does not render the act invalid, for pain is as much a part of the workman's loss as the loss of a limb or other member, and, while the actual pain may not be shifted, it may be compensated for. (Per Mr. Justice Holmes, Mr Justice Clarke, and Mr. Justice Brandeis.)

(For other cases, see Master and Servant, Dec. Dig. § 11.)

The Chief Justice, Mr. Justice McKenna, Mr. Justice McReynolds, and Mr. Justice Van Devanter dissenting.

In Error to the District Court of the United States for the District of Arizona.

In Error to the Supreme Court of the State of Arizona.

Action by Joseph B. Hammer against the Arizona Copper Company, Limited. There was a judgment in the United States District Court for plaintiff, and defendant brings error. Action by Richard Bray

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against the Arizona Copper Company, Limited. There was a judgment for plaintiff in the United States District Court, and defendant brings error. Action by Dan Veazey against the Ray Consolidated Copper Company. There was a judgment for plaintiff in the United States District Court, and defendant brings error. Action by Ceferino Mendez against the Inspiration Consolidated Copper Company. A judgment for plaintiff was affirmed by the Supreme Court of Arizona (19 Ariz. 151, 166 Pac. 278), and defendant brings error. Action by Frank Tomich, sometimes known as Frank Thomas, against the Superior & Pittsburg Copper Company. A judgment for plaintiff was affirmed by the Supreme Court of Arizona (19 Ariz. 182, 165 Pac. 1101), and defendant brings error. The cases were consolidated in the Supreme Court, and the judgments for the several plaintiffs affirmed.

Cases Nos. 20 and 21:

Messrs. Ernest W. Lewis, of Phœnix, Ariz., John A. Garver, of New York City, and William C. McFarland, of Douglas, Ariz., for plaintiff in error.

Messrs. Frank E. Curley, of Tucson, Ariz., L. Kearney, of Clifton, Ariz., and Frank H. Hereford, of Tucson, Ariz., for defendants in error.

Case No. 232:

Messrs. William H. King, of New York City, and Alex Britton, Evans Browne, and F. W. Clements, all of Washington, D. C., for plaintiffs in error.

Mr. Edward W. Rice, of Globe, Ariz., amicus curiæ.

Case No. 332:

Messrs. Edward W. Rice, of Globe, Ariz., and Harvey M. Friend, of Washington, D. C., for plaintiff in error.

Mr. Graham Foster, of New York City, for defendant in error.

Case No. 334:

Mr. C. T. Knapp, of Bisbee, Ariz., for plaintiff in error.

Mr. Samuel Herrick, of Washington, D. C., for defendant in error.

PITNEY, J. delivered the opinion of the Court.

In each of these cases, a workman in a hazardous industry in the state of Arizona, having received in the course of his employment a personal injury through an accident due to a condition or conditions of the occupation, not caused by his own negligence or so far as appears by that of his employer or others, brought action under the Employers' Liability Law of Arizona, and recovered compensatory damages against the employer ascertained upon a consideration of the nature, extent, and disabling effects of the injury in each particular case. And the question is raised whether the statute referred to, as applied to the facts of these cases, is repugnant to that provision of the Fourteenth Amendment which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article 18 of the Constitution of the state of Arizona is entitled "Labor," and contains, among others, the following sections:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption

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of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an employers' liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The Legislature shall enact a workmen's compulsory compensation law applicable to workmen engaged in manual or mechanical labor in such employments as to the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, of employees, to exercise due care, or to comply with any [law?] affecting such employment: Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Pursuant to section 7 the Employers' Liability Law was enacted (chapter 89, Laws 1912, Reg. Sess.; Arizona Rev. Stat. 1913, pars. 3153-3162; pursuant to section 8 a Workmen's Compulsory Compensation Law was enacted (chapter 14, Laws 1912, 1st Spec. Sess.; Arizona Rev. Stat. 1913, pars. 3163 et seq.)

In two of the present cases the former law was sustained by the Supreme Court of Arizona against attacks based upon the Fourteenth Amendment. Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 1183; Superior & Pittsburg Copper Co. v. Tomich, 19 Ariz. 182, 165 Pac. 1101, 1185. In the other three cases it was sustained by the United States District Court for that district. And the resulting judgments in favor of the injured workmen are brought under our review by writs of error.

[1] Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies, as tending not to obviate but to promote litigation, and as pregnant with danger to the industries of the state. With such considerations this court cannot concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

[2-4] We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. Second

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Employers' Liability Cases, 223 U. S. 1, 47-53, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; New York Central R. R. Co. v. White, 243 U. S. 188, 196, et seq., 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Middleton v. Texas Power & Light Co., 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. ——. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

[5] The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection. The statute, in respect of certain specified employments designated as inherently hazardous and dangerous to workmen—and reasonably so described—imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages, excluding all such as are speculative or punitive (Arizona Copper Co. v. Burciaga, 177 Pac. 29), for accidental personal injury, or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death of the employee shall not have been caused by his own negligence. This is the substance of paragraphs 3154 and 3158, and they are to be read in connection with paragraph 3156, which declares what occupations are hazardous within the meaning of the law. By paragraph 3160, contracts and regulations exempting the employer from liability are declared to be void.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employee killed or injured. In determining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the Fourteenth Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations requiring the employer to assume the risk under certain circumstances, the employee under others. Seaboard Air Line v. Horton, 233 U. S. 492,

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504, 505, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; s. c. 239 U. S. 595, 598, 599, 36 Sup. Ct. 180, 60 L. Ed. 458, and cases cited.

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee in the absence of legislation. They are not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation, is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. Chicago, Milwaukee R. R. v. Ross, 112 U. S. 377, 383, 5 Sup. Ct. 184, 28 L. Ed. 787; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 647, 6 Sup. Ct. 590, 29 L. Ed. 755; New York Central R. R. Co. v. White, 243 U. S. 188, 199, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Farwell v. Boston & Worcester R. R. Corp., 4 Metc. (Mass.) 49, 57, 38 Am. Dec. 339. In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employee except such as necessarily arises from their different relation to the common undertaking. Both are essential to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's part. See 243 U. S. 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. The statute requires that compensation shall be paid to the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid by the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the "equal protection of the laws."

[6] Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or

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can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject-matter, and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the states from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost in industry, although it does bring to light a burden that previously existed, but perhaps was unrecognized, by requiring that its cost be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for this reward the net profits, if any.

The interest of the state is obvious. We declared in the White Case, 243 U. S. 207, 37 Sup. Ct. 254, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629:

"It cannot be doubted that the state may prohibit and punish self-maiming and attempts and suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable'; and the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. * * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations" (citing cases).

And in Mountain Timber Co. v. Washington, 243 U. S. 219, 239, 37 Sup. Ct. 260, 265 (61 L. Ed. 685, Ann. Cas. 1917D, 642) it was said:

"Certainly, the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern."

Having this interest, the state of Arizona reasonably might say:

"The rule of the common law requiring the employee to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation, and to secure his indemnity in advance in the form of increased wages, is incompatible with the public interest because—assuming that workmen are on an equality with employers in a negotiation about the rate of wages—the probability of injury occurring to a particular employee, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employee approximately to estimate in advance how much allowance should be made for them in the wages; and even

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were a proper allowance made, experience demonstrates that under our conditions of life it is not to be expected that the average workingman will set aside out of his wages a proper insurance against the time when he may be injured or killed. Hence, recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries, we will require that it be assumed by the one in control of the industry as employer, just as he pays other items of cost; so that he shall not take a profit from the labor of his employees while leaving the injured ones, and the dependents due to the conditions of the occupation, to be a burden upon the public."

[7] Whether this or similar reasoning was employed, we have no means of knowing; whether, if employed, it ought to have been accepted as convincing, is not for us to decide. It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject and not so unfounded or irrational as to permit us to say that the state, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action, by the Fourteenth Amendment.

[8, 9] It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions of employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations. In this, as in other cases, there is a corrective in the authority of the court to set aside an exorbitant verdict. And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of "due process of law."

Much stress is laid upon that part of our opinion in the White Case, where, after citing numerous previous decisions upholding the authority of the states to establish by legislation departures from the fellow servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee, we said (243 U. S. 201, 37 Sup. Ct. 252, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629):

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. * * * No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place," etc.

In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employee, would be regarded as in conflict with the due process clause. We cannot, however regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the state of Arizona to determine; but we find no ground for declaring that they

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have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employee attributable to the inherent dangers of the occupation shall be assumed, not wholly by the particular employee upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary process of law, shall be assumed by the employer; leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other unusual loss of the business; and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of indifference, or upon a question of mere economics, but in the course of regulating the conduct of those hazardous industries in which human beings—their own people—in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The statute says to the employer, in effect:

"You shall not employ your fellow men in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation."

The rule being based upon reasonable grounds affecting the public interest, being established in advance and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment.

Some expressions contained in our opinion in the White Case, 243 U. S. 203, 204, 205, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, are treated in argument as if they were equivalent to saying that if a state, in making a legislative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (243 U. S. 196-200, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629) it had been shown that the employer had no constitutional right to continued immunity from liability in the absence of negligence, nor to have the fellow servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured—an additional feature at variance with the common law—was then upheld; but, of course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps a fortiori, that the Arizona method of ascertaining the compensation according to the facts of each particular case—substantially the common-law method—is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon ground not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Whether the compensation should be paid in a single sum after judgment recovered as is required by the Arizona Employers' Liability Law just as under the common-law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by installment payments covering the period of disability or

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of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question.

[10, 11] To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied: First, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364; Hendrick v. Maryland, 235 U. S. 610, 621, 35 Sup. Ct. 140, 59 L. Ed. 385; Middleton v. Texas Power & Light Co., 249 U. S. 152, 157, 39 Sup. Ct. 227); and, secondly, it hardly is necessary to add that employers in nonhazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

[12] To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the state, it is sufficient to say that no such question is involved in these records; in Arizona Copper Co. v. Burciaga, 177 Pac. 29, a case of personal injuries not total, the Supreme Court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may be so construed in its application to death claims; and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the federal Constitution. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, 34 Sup. Ct. 359, 58 L. Ed. 713; St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 369, 35 Sup. Ct. 99, 59 L. Ed. 265.

[13] It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among several remedies. In Consolidated Arizona S. Co. v. Ujack, 15 Ariz. 382, 384, 139 Pac. 465, 466, the Supreme Court of the state said:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. §§ 4, 5, art. 18. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. § 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. § 8, art. 18."

It is said by counsel that the Compensation Act, because it limits the recovery, never is resorted to in practice unless the employee has been negligent, and hence is debarred of a remedy under the Liability Act. But it is thoroughly settled by our previous decisions that a state may abolish contributory negligence as a defense, and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course.

Other points are suggested, but none requiring particular discussion.

Judgments affirmed.

McKenna, J., dissenting.

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever—indeed, may even be extended. It is said to rest on the cases sustaining the Workmen's Compensation Law of New York, 243 U. S. 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D,

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629, and its associated cases in the same volume upholding like laws of other states. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea—the metaphor suggests a peril in the consequences.

But let me in a more concrete way make application of this comment. I may assume that the purpose and principle and general extent of Workmen's Compensation Laws are known. I must rest on that assumption, for even an epitome of them or the reasons for them would unduly extend this dissent. The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the Compensation Laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can only be done by bringing its instances and theirs under the same generalization; that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation. Of this there can be no disguise. It may be confused by argument and attempt at historical analogies and deductions, but to that comprehensive principle the case must come at last. All else is adventitious, and puts out of view the relation of the factors of production. It puts out of view that employers are as necessary to production as employees and subjects to peril the voluntary conduct of the former and leaves out of account as an element the voluntary conduct of the latter. In other words, there is a clear discrimination, a class distinction with its legal circumstances and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification. And these effects cannot be concealed under any camouflage nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer and employee. Unquestionably there is a difference—it constitutes the life of the relation. But the question is: Who shall compensate the injury that may result from the relation, voluntarily assumed by both, urged by their respective interests and a calculation of advantage?

But I pass this discrimination and return to the law as a violation of the employer's right considered absolutely and abstractly. It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame; and yet the court now by its decision erects the denial of these postulates of conduct into a principle of law and governmental policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty and invert the conceptions of mankind of the relation of right and wrong action. If the legislation does not punish without fault what does it do? The question is pertinent. Consider what the employer does: He invests his money in productive enterprise—mining, smelting, manufacturing, railroading—he engages employees at their request and pays them the wages they demand; he takes all of the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable. I find it difficult to answer the argument advanced to support or palliate this effect, or independently of it to justify the interference with rights. It is a certain impeachment of some rights to assume that they need

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justification, and a betrayal of them to make them a matter of controversy. There are precepts of constitutional law, as there are precepts of moral law, that reach the conviction of aphorisms and are immediately accepted by all who understand them, and comment is considered as confusing as unnecessary. I say this, not in dogmatism, but in expression of my vision of things, and I say it with deference to the contrary judgment of my Brethren of the majority.

Of course, reasons may be found for the violation of rights, advantage to somebody or something in that violation. Tyranny even may find pretexts, and seldom boldly bids its will avouch its acts, and certainly there can be no accusation of barefaced power in the Arizona law. Its motives and purposes are worthy, and it requires some resolution of duty to resist them. It must be seen, and is seen, however, that the difference between the position of employer and employee, simply considering the latter as economically weaker, is not a justification for the violation of the rights of the former, and that individual rights cannot be made to yield to philanthropy, and therefore the welfare of the government is brought forward and displayed. The law saves the government, is the comment, from the burden of paupers, its administration and peace from the disturbance of criminals. The answer, I think, is immediate. Government, certainly constitutional government, cannot afford to infringe, indeed, betrays its purpose if it infringes, a right of anybody upon money considerations or for ease in the exercise of its faculties.

But, granting that there is something in the argument, what shall be the limits of its application? Will it extend the principle of the present case to nonhazardous employments? If not, why not? The Arizona law stops with certain occupations which it calls "hazardous"; but it includes in the description "manufacturing," without qualifying words. In the New York Compensation Law passed on in New York Central Railroad v. White, 243 U. S. 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, there were 42 groups of hazardout occupations. In 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, the court had quite a struggle with the provisions of the Washington Compensation Law, which was so far different from those of the other cases as to incur the dissent of members of the court. It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be liability without fault in one occupation, and that can be a principle of legislation, why not in any other? Who is to determine the application, court or Legislature? If the latter, a court may not even express apprehension of its exercise, and yet it cannot put out of view the drift of events and in blind fatalism await their incidence when called upon to consider the legality of such exercise. We know things are in change—have changed —and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee, and to give to the latter a particular distinction, relieve him from a responsibility which would seem to be, and which until lately it has been the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and therefore, as a consequence, that where he has liberty of action he has responsibility for action. In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions, and from the action of economic forces and their consequences, give it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion and inevitable sympathy with it, as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot be predicted, but it is very certain that, whatever it be, the judgment now delivered will be cited

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to justify it. Will it not be said that, if one right of an employer can be made to give way, why not another?—made a condition "upon economic or other grounds" of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another? There is therefore, I think, menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy. If, however, this general apprehension be not justified, there is threat enough in the judgment of the court to the interest of employers generally as a result of the difference in conditions.

A rather curious argument is used to support the Arizona law. It is said, in justification of its discrimination between employer and employee, that the employer may, in relief from it and rescue from its burdens, pass them to the consumers of his products, as he does or may do in the case of other expenses of his venture, and in the long run their incidence is, as it is said it should be, on the public, and that the Legislature in so considering was reasoning within constitutional bounds. There is attractive speciousness in the argument. The individual employer seems to be divested of grievance, and the problem the law presents to be one of economics and governmental policy—is a kind of taxation, an expense of government, the burden of which is properly laid upon the public, and over which a court can have but limited power.

If it is intended by the argument to express no more than a tendency, while it has no relevancy, I think, upon the validity of the law, there may be no danger in it. If it is intended to be erected into a principle, there is danger in it. It is certainly facile and comprehensive. What burden can be put upon industry or the activities of men that may not be justified by it?

Of course, there will be no production unless all of its costs be reimbursed by the price of the articles produced. And by costs, I mean as well the burdens of government as profit to the employer—his inducement to enterprise, and the wages of employees—their inducement to labor. Without such reimbursement there will be no production, and cannot be beyond a certain extent and for a certain time; and there is no way to effect it but through the consuming public. But recourse to such consumption as a rescue from the law is not a justification for the law, and it is very doubtful if it had any conscious influence in the enactment of the law.

Indeed, in the present case what could have been its influence, and to what extent can it have an ameliorating effect? An employer in the indicated industries can have no relief except in the home market. If his products (where there are products) go beyond—go to other states—they will meet the competition of unburdened products. But this is obvious and needs no comment.

The Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds concur in this dissent.

McReynolds, J., dissenting.

While I earnestly join in the dissent written by Mr. Justice McKenna, it seems not inappropriate to state my own views somewhat more fully. The important and underlying question is common to the five cases. No. 232 is typical and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States District Court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila county, Ariz., "wherein steam, electricity, or other mechanical power was then and there used to operate machinery." He alleged that while exercising

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due care he "suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service, and employment, and due to a condition or conditions of such occupation or employment," which injuries were not caused by his negligence, but were sustained in the manner following:

"Plaintiff in the due course of his said labor, service, and employment was standing upon a certain timber or joist incorporated in said 'flotation system,' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately 10 feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground. * * * with great force and violence, * * * was permanently injured, and will forever remain sick, sore, lame, and crippled."

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the Fourteenth Amendment; judgment went against it; and the cause is here by writ of error to the trial court. Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156 (Comp. St. § 1214).

Article 18 of the Arizona Constitution provides:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts of omissions of any other servant or servants of the common master, is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The Legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any law affecting such employment: Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Obeying the constitutional mandate, the Legislature enacted the "Employers' Liability Law," approved May 24, 1912 (chapter 89, Laws of Ariz. 1912, p. 491; Rev. Stat. Ariz. 1913, §§ 3153-3162), which provides:

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That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in section 4—among them all work in or about mines and in mills, shops, plants and factories where steam or electricity is used to operate machinery—every employer, whether individual, association, or corporation, "shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in section 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee, and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased."

Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury. The full text of the act is as follows:

Laws of Arizona 1912, c. 89, p. 491; Rev. Stat. Ariz. Civil Code 1913, §§ 3153-3162, p. 1051.

"Section 1. That this act is and shall be declared to be an Employers' Liability Law as prescribed in section 7 of article XVIII of the state Constitution.

"Sec. 2. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway, transportation or any other industry, as provided in said section 7 of article XVIII of the state Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Sec. 3. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in section 4 of this act are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of section 2 of this act.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"Sec. 4. The occupations hereby declared and determined to be hazardous within the meaning of this act are as follows:

"1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plant, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

"2. All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

"3. The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

"4. The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

"5. All work on ladders or scaffolds of any kind elevated twenty (20) feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

"6. All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

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"7. All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

"8. All work in or about quarries, open pits, open cuts, mines, or reduction works and smelters.

"9. All work in the construction and repair of tunnels, sub-ways and viaducts.

"10. All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"Sec. 5. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations, or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in section 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none then to his personal representative, for the benefit of the estate of the deceased.

"Sec. 7. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this act to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times be left to the jury, as provided in section 5 of article XVIII of the state Constitution.

"Sec. 8. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such employer under or by virtue of any of the provisions of this act, such employer may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity or that may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"Sec. 9. In all actions for damages brought under the provisions of this act, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful, and the judgment of the lower court is sustained by the higher court or courts, then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"Sec. 10. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 11. All acts and parts of acts in conflict herewith are hereby repealed.

"Whereas, the state Constitution commands the enactment of an Employers' Liability law by the Legislature at its first session; and

"Whereas, this act being said Employers' Liability law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and its approval by the Governor, and is hereby exempt from the operation of the referendum provision of the state Constitution."

Likewise, the Legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to workmen in the same occupations as those declared hazardous by the Employers' Liability Law (Chapter 14, laws of Ariz. Spec. Sess. 1912, p. 23). Material portions of it are as follows:

Sec. 2. That compensation graduated according to average earnings and limited to $4,000 "shall be paid by his employer to any workman engaged in any employment declared and determined * * * to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment."

"Sec. 4. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in section 8 of article XVIII of the state Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in section 7, article XVIII of the state Constitution) he may so refuse to settle and may retain said right."

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"Sec. 6. The common-law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned."

"Sec. 14. * * * Provided, if, after the accident either the employer or the workman shall refuse to make or accept compensation under this act or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the state Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."

In Consolidated Arizona S. Co. v. Ujack (1914) 15 Ariz. 382, 384, 139 Pac. 465, 466, the Supreme Court declared:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. §§ 4, 5, art. 18. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. § 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. § 8, art. 18."

In Inspiration Consolidated Copper Co. v. Mendez (July 2, 1917) 19 Ariz. 151, 157, 166 Pac. 278, 279, 281, 283, the Supreme Court specifically held that the Employers' Liability Law does not conflict with the Fourteenth Amendment, and among other things said:

"That the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. * * * In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation."

(This opinion was reaffirmed in Superior & Pittsburg Copper Co. v. Tomich [July 2, 1917] 19 Ariz. 182, 165 Pac. 1101, 1185.)

In Arizona Copper Co. v. Burciaga (1918) 177 Pac. 29, 31, 32, 33, the Supreme Court said:

"As clearly intimated by this court in Inspiration Consolidated Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. * * *

"The liability incurred by the employer from a personal injury sustained by his employee from an accident arising out of and in the course of labor, service, and employment in hazardous occupations specified in the statute, and due to a condition or conditions of such occupation or employment, if such shall not have been caused from the negligence of such employee, is such an amount as will compensate such employee for the injuries sustained by him directly attributable to such accident. * * *. 'Liable in damages,' as used in paragraph 3158, c. 6, of title 14, Employers' Liability Law, Rev. Stat. of Ariz. 1913, has reference to and means that

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the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. * * * Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

From the foregoing it appears that we have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the state and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries—including physical and mental pain—which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to profitable ability to pay the award; length of service is unimportant—a minute seems enough; wages contracted for bear no necessary relationship to what may be recovered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under this act or under the Compensation Law or according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights protected by the Fourteenth Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well-defined constitutional guaranties.

Of course, the Fourteenth Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. Holden v. Hardy, 169 U. S. 366, 387, 18 Sup. Ct. 383, 42 L. Ed. 780. But it did strip the states of all power to deprive any person of life, liberty or property by arbitrary or oppressive action—such action is never due process of law.

In the last analysis it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and inspirit our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval—otherwise constitutional inhibitions would be futile. And plainly, I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods.

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After great consideration in Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764, and Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960, this court declared that the Fourteenth Amendment guarantees to both employer and employee the liberty of entering into contracts for service subject only to reasonable restrictions. "The principle is fundamental and vital."

In the first case an act of Congress prohibiting interstate carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization, was declared in conflict with the Fifth Amendment. In Coppage v. Kansas a state statute which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment was held invalid under the Fourteenth Amendment, and we said:

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state."

In Truax v. Raich, 239 U. S. 33, 41, 36 Sup. Ct. 7, 10 (60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283) an Arizona statute prohibiting employment of aliens except under certain conditions was struck down. We there said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

The right to employ and the right to labor are correlative—neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress, struck down in the Adair Case, by the Kansas statute, declared invalid in the Coppage Case, and by the Arizona statute, held inoperative in the Truax Case, viewed as practical matters seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the Legislature has power to protect society against the consequences of accidental injuries, and therefore it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness, and pauperism, the outlook for the enactment seems much too good.

In New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, and Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the Fourteenth Amendment although they imposed liability without fault and introduced a plan for compensating workmen, unknown to the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such characteristics had not been found, the result, necessarily, would have been otherwise, unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are wholly lacking. The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the

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employee is relieved from consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery which may ultimately go to nondependents, distant relatives, or, by escheat, to the state; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations"—on the contrary, it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employee or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an employer may benefit only a distant relative, financially independent; the prescribed responsibility is not "to contribute reasonable amounts according o a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive. While the statute is inattentive to the employee's fault, it permits recovery in excess of the employee's pecuniary misfortune, and provides for compensation, not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount, and not distributed over such long period as to afford actual protection against loss or lessened earning capacity with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the state's police power. It is unreasonable and oppressive, upon both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution, and heretofore, as I think, respected and enforced.

The Chief Justice and Mr. Justice McKenna and Mr Justice Van Devanter concur in this opinion.

HOLMES, J., concurring.

The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve and brought the present suit. The injury was found to have been due to risks inherent to the business and so was within the Employers' Liability Law of Arizona, Rev. Stats. 1913, Title 14, Ch. 6. By that law as construed the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. Par. 3158. There was a verdict for the plaintiff, judgment was affirmed by the Supreme Court of the State, 19 Ariz. 151, 166 Pac. 278, 1183; and the case comes here on the single question whether, consistently with the Fourteenth Amendment, such liability can be imposed. It is taken to exclude "speculative, exemplary and punitive damages," but to include all loss to the employee caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain. See Arizona Copper Co. v. Burciaga, 177 Pac. 29, 33.

There is some argument made for the general proposition that immunity from liability when not in fault is a right inherent in free government and the obiter dicta of Mr. Justice Miller in [Citizens' Savings &] Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455, are referred to. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment and there is nothing in the Constitution to limit the principle of that instance. St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1, 22, 17 Sup. Ct. 243, 41 L. Ed. 611; Chicago, Rock Island & Pacific Ry. Co. v. Zernecke, 183 U. S. 582, 586, 22 Sup. Ct. 229, 46 L. Ed. 339; St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061. See Guy v. Donald, 203 U. S.

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399, 406, 27 Sup. Ct. 63, 51 L. Ed. 245. There are cases in which even the criminal law requires a man to know facts at his peril. Indeed the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought. The Germanic, 196 U. S. 589, 596, 25 Sup. Ct. 317, 49 L. Ed. 610; Nash v. United States, 229 U. S. 373, 377, 33 Sup. Ct. 780, 57 L. Ed. 1232; Eastern States Retail Lumber Dealers' Association v. McBride, 234 U. S. 600, 610, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; Miller v. Strahl, 239 U. S. 426, 36 Sup. Ct. 147, 60 L. Ed. 364. Without further amplification so much may be taken to be established by the decisions. New York Central R. R. Co. v. White, 243 U. S. 188, 198, 204, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 336, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642.

[14] I do not perceive how the validity of the law is affected by the fact that the employee is a party to the venture. There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable for accidents. Like the crimes to which I have referred they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort—that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendency of juries when such elements are allowed. But if it is proper to allow them of course no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and the States have established. Why, then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. Ball v. William Hunt & Sons, Ld., [1912] A. C. 496. But whether they do or not they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just. If a legislature should reason in this way and act accordingly it seems to me that it is within Constitutional bounds. Matter of Erickson v. Preuss, 223 N. Y. 365, 119 N. E. 555. It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered. Apart from the control exercised by the judge it is to be hoped that juries would realize that unreasonable verdicts would tend to make the business impossible and thus to injure those whom they might wish to help. But whatever they may do we must accept the tribunal, as I have said, and are bound to assume that they will act rightly and confine themselves to the proper scope of the law.

It is not urged that the provision allowing twelve per cent. interest on the amount of the judgment from the date of filing the suit, in case of an unsuccessful appeal, is void. Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, 325-327, 22 Sup. Ct. 662, 46 L. Ed. 922; Consaul v. Cummings, 222 U. S. 262, 272, 32 Sup. Ct. 83, 56 L. Ed. 192.

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Mr. Justice Brandeis and Mr. Justice Clarke concur in this statement of additional reasons that lead me to agree with the opinion just delivered by my Brother Pitney.

SUPREME COURT OF CALIFORNIA.

HYMAN BROS. BOX & LABEL CO. ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 8890.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—STATUTE APPLICABLE.

The rights of an injured servant are measured by the Workmen's Compensation Act in force at the time of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CERTIORARI—JURISDICTIONAL QUESTION.

Determination of question whether or not certain described actions of an employee amounted to willful misconduct within the Workmen's Compensation Act goes to the jurisdiction of the Industrial Accident Commission, and therefore is reviewable on certiorari.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"WILLFUL MISCONDUCT."

A 20-year-old employee working at a press was not, as a matter of law, guilty of willful misconduct within the Workmen's Compensation Act in catching at certain falling or loose cards, so that his hand was caught between the bed and platen of the press, though he had been warned against the danger of so doing; the act being possibly instinctive.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION TO INJURED MINOR—"AFTER."

Under Workmen's Compensation Act 1913, § 17c, as amended by St. 1915, p. 1086, § 6, in case of injury to an employee in his twentieth year, the Industrial Accident Commission had no power to compute compensation on basis of probable wages which employee might obtain long after reaching his majority; "after," as used in the section in relation to the average weekly earnings of a minor employee being the weekly sum he would probably be able to earn "after" attaining the age of 21 years, meaning "at."

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

(For other definitions, see Words and Phrases, First and Second Series, After.)

*Decision rendered, May 29, 1919. 181 Pac. Rep. 784.

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In Bank.

Certiorari by the Hyman Bros. Box & Label Company and the Ætna Life Insurance Company, to review an award of the Industrial Accident Commission under the Workmen's Compensation Act in favor of Fred Weiss, a minor, represented by Mathiew Weiss, his guardian ad litem and trustee. Award annulled, and matter remanded to commission.

E. L. Stockwell and Redman & Alexander, all of San Francisco, for petitioners.

Christopher M. Bradley and Warren H. Pillsbury, both of San Francisco, for respondent.

MELVIN, J. Certiorari to review the award of the Industrial Accident Commission in favor of Fred Weiss, who was injured by having his hand caught in a printing press to which he was "feeding" pieces of pasteboard that were cut by the machinery into proper shape for use in the making of pasteboard boxes.

[1] The injury was suffered by the applicant for compensation in the month of December, 1917, and his rights must be measured by the Workmen's Compensation Act of 1913, as amended in 1915 (St. 1915, p. 1079), which was then in force.

The applicant was 20 years of age at the time of the injury. He had worked for the Hyman Bros. Box & Label Company, generally as a "press feeder," three times, his terms of employment aggregating about 19 months. He had worked for another corporation, also as a press feeder, for 2 years and 2 months. It thus appears that he was an experienced workman almost of the age of majority.

The press at which Mr. Weiss was working when he was injured was equipped with a stationary upright plate called the "bed" and a plate called the "platen," which repeatedly opened and closed against the "bed." In operating the press he stood in front of it, removing the cut pasteboard with his left hand and inserting the uncut sheets with his right hand. Sometimes a cardboard sheet would slip off the bed of the press and fall into the body of the press, and sometimes some of the uncut pieces would fall into the press from the "feed board," upon which the operator kept a supply. In such case the press could be stopped at once by moving a lever, and the card or cards could be removed without danger. The injury to the applicant occurred while he was reaching into the body of the moving press for a sheet or sheets which had fallen. Asked by the examiner if that was a proper thing for him to do, he said, "Well, it might not have been," and to the question, "Why not?" he replied as follows:

"When I first came to Hyman Bros. Box & Label Company, I was told not to grab any sheets, when I first came there. That was 3 or 3½ or 4 years ago. Then I left Hyman Bros. again and came back, after feeding that many years, and, being that I was experienced in feeding, I was not told that any more."

Following this statement the questions and answers were as follows:

"You knew then that that instruction had been given you, and you knew it was not a proper thing to do? A. Yes.

"Q. Had anybody ever seen you do that before, any of the foremen? A. I don't know. I couldn't tell you that.

"Q. You had done it two or three times before? A. Yes, sir.

"Q. And you did it this time? A. Yes, sir."

At another place in the return to the writ his testimony is reported as follows:

"Q. Mr. Weiss, if you were reaching into that machine to take out loose cards that had fallen in there while the machine was in

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motion, you were doing something you knew was not exactly proper, weren't you? A. The loose ones, you mean?

"Q. Yes. A. Yes, sir.

"Q. But nobody had said anything to you in the last year or two about doing that? A. No, sir.

"Q. But when you first came there, as I understand you, you were instructed never to reach into the machine? A. When I first started to learn. That was the first place I fed. I was just starting to learn to feed at that time.

"Q. What did they say to you? A. They told me, 'You don't want to put your hand into the machine if any sheets fall down, because you can get more sheets than you can hands.'

"Q. What would have been the right thing to have done if those sheets had fallen in there? A. Stop the machine. It didn't do any harm, and you could still keep running."

In his application to the Industrial Accident Commission for compensation Mr. Weiss had described the occasion of the injury as follows:

"Some sheets of box board dropped from the feed board into the press, and applicant reached with his left hand to catch them; the left hand and arm being caught between bed and platen."

[2] The Industrial Accident Commission found that in attempting to catch the card "the employee acted instinctively without reflection, and such act did not constitute willful misconduct, and that therefore said injury was not caused by willful misconduct of the employee." Petitioners attack this finding as contrary to the evidence. This they say, is the case of an employee who, with full appreciation of the danger, violated specific instructions given him for his own protection. The question before us, therefore, is whether or not the described actions of the employee amounted to willful misconduct. That an answer to such a problem goes to the jurisdiction of the Industrial Accident Commission is settled by decisions of this court. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35; Fidelity & Deposit Co. v. Industrial Accident Commission, 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903.

[3] The doctrine that an unpremeditated and impulsive act in violation of orders may not be willful misconduct finds some support in the authorities but usually nonage is an element of the decisions in which such doctrine has been upheld. It seems to us, however, that the age of the person injured does not necessarily make a material difference. The tendency to recover something falling from a machine; to reach for a hat blown off the head by a sudden gust of wind; to apply the brakes to a "skidding" automobile—in short to perform acts of many sorts upon the impulse of the moment, is not the failing of youth alone. The true tests to be applied have reference to the nature of the work being performed and the circumstances of each particular case. This court has been at pains more than once to define "willful misconduct." Perhaps the best definition (and, incidentally, the one cited by both parties to this controversy) is the one found in the opinion in Great Western Power Co. v. Industrial Accident Commission, 170 Cal. 180, at page 189, 149 Pac. 35, 40. The court used this language:

"Willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. Casey v. Humphreys (1913) 6 B. W. C. C. 520. But it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct. Brooker v. Warner, 23 L. T. R. 201."

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In that case (known in the profession as the "Mayfield Case"), the applicant had entered upon the duty of handling wires used for the transmission of high tension electric current, without putting on the nonconducting gloves which the rules of his employer, well understood by him, required him to wear at such times. From the very nature of the act it was one which involved deliberation and a willful disobedience of a salutary rule. There was no room for the application of the doctrine of sudden impulse. The facts of the present case are vastly different. Admittedly, the petitioner Weiss knew the rule. Admittedly, he did something in apparent violation of the rule, which, if it had been the result of deliberate intention, would have amounted to willful misconduct; but the circumstances were such that any person, experienced or not, might have impulsively put himself in jeopardy as this young man did, without any intent to violate a known rule. There is evidence to support the conclusion reached by the Industrial Accident Commission, and we are of the opinion that upon this branch of the case a correct conclusion was reached. At the rate of the running of the press, the feeder was given at most a little more than one second for the entire operation of removing each cut piece of cardboard and inserting one that was uncut. Upon seeing a card fall into the machine he was given but the smallest degree of time for deliberation and for determining whether or not he should reach for the pasteboard. It needs no argument to convince a court that a person in such a situation will not be judged by the same standards as one who breaks a rule by means involving time for reflection and excluding the possibility of sudden impulse. It is doubtless true that such an accident might come under the doctrine of the "Mayfield Case," as, for example, where an operative habitually and intentionally ignored the rule; and if the commissioners had believed the testimony of one witness who stated that after the injury Weiss admitted reaching into the moving press for fallen cards hundreds of times before, a finding of willful misconduct would have resulted. But the applicant denied the interview and the alleged statements attributed to him. Therefore, we cannot disturb the finding made by the triers of facts.

The authorities sustain the views expressed above. In Whitehead v. Reader, [1901] 2 K. B. 48, it was held that where a man tried to replace a belt which had slipped from the machinery, such act may be regarded as venial, and not willful misconduct on his part. In McNicholas v. Dawson, [1899] 1 Q. B. 773, it was announced that each case must depend upon its own peculiar facts, and that the breaking of rules does not necessarily constitute serious misconduct. In Peru Basket Co. v. Kuntz (Ind. App.) 122 N. E. 349, it was held that an employee with defective eyesight, who inadvertently placed his hand contrary to directions in a place where it was caught by a cutting machine, was not guilty of willful disobedience.

Petitioners have cited many authorities to the effect that where a servant goes outside of the scope of his authority, although still upon the employer's premises, he may not recover for any injury. Typical of such decisions is Williamson v. Industrial Accident Commission, 171 Pac. 797. The facts there disclosed were these: The applicant for compensation had gratuitously undertaken to clean a light well. She was injured while performing this task, but it was held that as she was not engaged to do that sort of work she was not entitled to compensation for her injuries. Undoubtedly that and similar authorities announce a correct rule, but one having no application to the facts now before us. Not one of them involves the conduct of an employee confronted with a sudden and unexpected situation furnishing almost irresistible occasion for impulsive action.

[4] Petitioners' only other objection is to the amount of the award which, it is asserted, was in excess of that which the commission was empowered to give. With this view we agree.

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Section 17c of the Workmen's Compensation Act is in its essential parts as follows:

"If the injured employee is under twenty-one years of age, * * * his average weekly earnings shall be deemed * * * to be the weekly sum, that under ordinary circumstances he would probably be able to earn after attaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury, or the occupation to which he would reasonably have been promoted, if he had not been injured." St. 1915, p. 1086, § 6.

The Industrial Accident Commission made the award upon the assumption that "after attaining the age of twenty-one years" means a reasonable time after majority. It was the theory that if the wages being earned at the time of injury were essentially "boy's wages," then the commission might base the amount of compensation upon "the adult's wages which the same individual would be expected to reach within the few months, or perhaps even a few years after passing the age of twenty-one."

With this view of the law we cannot agree. The infirmity of the rule must be apparent when we remember that there is no rule by which the exact difference between "boy's wages" and the "man's wages" may be computed. This applicant was in his twenty-first year at the time of the injury. Under the statute quoted above the commission was bound to find his probable earnings at the age of 21 years. Such an interpretation of the word "after" is fully in accord with sound reason and authority. For example, bequests to take effect "after death" vest at death. In re Swinburne, 16 R. I. 208, 14 Atl. 850; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Atwell's Executors v. Barney, Dud. (Ga.) 207. In 2 C. J. 395, among the definitions of "after" given are "as soon as; at or immediately after; on; simultaneously; upon." That the framers of the Compensation Act intended the word "after" to mean "at" is obvious when we have in mind that different parts of a statute are to be so construed as to make them consistent and harmonious, giving proper effect to each of them. If the young man had been 21 years and 1 day old when he was injured, the commission would have been under the necessity of fixing his compensation in accordance with his wages at that time. To hold that because he was a few months under the age of 21 a much more flexible rule should apply would be an interpretation of the statute in a manner out of harmony with the part having reference to adults. Therefore we must hold that the Industrial Accident Commission had no power to compute the compensation upon the basis of probable wages which appellant might obtain long after reaching the age of 21 years.

The award is annulled, and the matter is remanded to the Industrial Accident Commission, to the end that such proceedings may be taken as are not inconsistent with the views herein expressed.

We concur. Angellotti, C. J.; Shaw, J.; Lennon, J.; Olney, J.; Wilbur, J.; Lawlor, J.

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SUPREME COURT OF CALIFORNIA.

WESTERN PAC. R. CO.

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.
(S. F. 8959.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INTENTIONAL DISOBEDIENCE.

Where a young man of 18 operating a drill with an upright shaft, which machine carried the warning sign, "Stop before repairing, oiling," etc., on seeing a stream of grease running down the framework made a dive with a cloth at it, so that his hand was drawn into the machine, it was not as a matter of law intentional and willful disobedience to exclude him from recovering compensation under the compensation act, but the commission could find he was not so disobedient.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MINOR EMPLOYEE—AMOUNT OF COMPENSATION.

The Workmen's Compensation Act in case of injury to a minor employee justifies a finding of compensation based on the probable wage of the employee when he shall reach 21, not on that which he would be likely to earn within a reasonable time after attaining such age.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

In Bank.

Certiorari by the Western Pacific Railroad Company to review the action of the Industrial Accident Commission in awarding compensation under the Workmen's Compensation Act (St. 1915, p. 1079) to Earle Dean, a minor, represented by J. L. Dean, his guardian ad litem, and trustee. Award annulled, and matter remanded to the commission.

Henley C. Booth, of San Francisco, for petitioner.
Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. A writ of certiorari was issued for the purpose of reviewing the action of the Industrial Accident Commission in awarding compensation to Earle Dean. The questions involved are very similar to those discussed and decided in Hyman Bros. Box & Label Co. and Ætna Life Insurance Co. v. Industrial Accident Commission, S. F. No. 8890, 181 Pac. 784, this day decided. In this proceeding, as in that one, the two contentions made by the petitioner were: (1) That the injury suffered was caused by the young man's serious and willful misconduct; and (2) that the commission exceeded its jurisdiction in fixing the basis for computing the average annual earnings of the injured minor.

The facts as disclosed by the testimony, which supports the findings, are in brief as follows:

Earle Dean was an intelligent young fellow, nearly 18 years of age. He had been set to operating a drill press, to which was affixed a metallic sign bearing words of warning.

The machine consisted of a drill with an upright shaft meshed into

*Decision rendered, May 29, 1919. 181 Pac. Rep. 787.

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gearings upon a horizontal shaft. In an opinion filed by two of the members of the Industrial Accident Commission the injury and its cause are discussed as follows:

"The vertical shaft at the time of the injury was revolving slowly, and it was easier to wipe it while in motion than when still. While applicant was wiping it he saw a stream of grease running down the framework of the machine from the upper shaft, and, without thinking about the consequences likely to flow from his act, made a dive with his cloth at this stream of grease. The gearing caught the cloth and drew his hand into it, resulting in the loss of two fingers.

"It is clear that the sign warning against wiping the machine while in motion was intended to cover just such unforeseen and unlikely injuries as this.

"It follows, therefore, that if the warning sign, 'Stop this Machine before Repairing, Oiling, Adjusting or Wiping' constituted a safety order and regulation prescribed by the employer, the wiping of the machine by the employee, with full knowledge of the existence of the order, and of the consequences likely to result from its violation, constituted willful misconduct.

"There is no question that applicant knew of the existence of this warning sign, but it is in evidence that he did not know of the consequences likely to result from disobeying it. The reaching for the stream of oil going down the frame of the machine was in obedience to an impulse, thoughtless of danger. He knew better than to try to wipe the gearings while the machine was in motion, and had never done so. Neither the employer's superintendent nor he young man in whose custody applicant was placed had explained to him the risk attendant upon such wiping. Therefore one of the factors of willfulness as laid down by our Supreme Court in the Mayfield Case (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 1 I. A. C. 669), to wit, 'Knowledge of the consequences likely to result from disobedience,' was wanting."

[1] It was held accordingly that—

"Neither of the acts of cleaning said drill nor wiping said shaft was intentionally and deliberately disobedient; that neither of said acts was an act of serious and willful misconduct, and the said injury was not caused by the serious and willful misconduct of the employee."

We cannot say that this finding was not justified by the evidence. It is true that wiping the drill while it was slowly revolving was in violation of the printed warning, but that act did not cause the injury. If the applicant had been holding a cloth in his hand for any purpose and had done the same impulsive act, he would have been entitled to compensation under the authority of the Hyman Case and the cases cited in the opinion therein. The real cause of the injury was the unpremeditated effort to arrest the sudden stream of grease.

[2] The finding with reference to the amount of compensation was based not upon the probable wage of the applicant at the time he should reach the age of 21 years, but upon that which he would be likely to earn "within a reasonable time after attaining the age of 21 years." This was a computation not justified by the statute. Upon the authority of Hyman Bros. Box & Label Co. and Ætna Life Insurance Co. v. Industrial Accident Commission, supra, it necessitates the granting of petitioner's prayer.

The award is annulled and the matter is remanded to the Industrial Accident Commission, to the end that such proceedings may be taken as are not inconsistent with the views herein expressed.

We concur: Angellotti, C. J.; Shaw, J.; Lennon, J.; Wilbur, J.; Lawlor, J.

Olney, J., deeming himself disqualified, did not participate in the foregoing decision.

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SUPREME COURT OF CALIFORNIA.

PERRY

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.

PACIFIC GAS & ELECTRIC CO.

v.

SAME. (S. F. 8918, 8910.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PROCEEDINGS—WEIGHT OF HEARSAY EVIDENCE.

In workmen's compensation case the weight to be given hearsay evidence made admissible by St. 1917, p. 871, § 60a, is for the Industrial Accident Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—TRANSACTION WITH DECEASED.

In workmen's compensation case, testimony by employer and his wife as to statements by deceased employee is admissible under the statute, though inadmissible at common law, because of their interest in the controversy.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW—CONCLUSIVENESS OF FINDING.

Industrial Accident Commission's finding that the relation of employer and employee existed is conclusive upon Supreme Court upon petition to review the commission's order.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE.

Workmen's Compensation Act of 1917, § 25, relating to liability of "principal employers and contracting employers, general or intermediate, for compensation under this act when other than the immediate employer of injured employee," is unconstitutional in so far as it attempts to authorize awarding of compensation against a third person not an employer, notwithstanding Const. art. 20, § 21, as amended October, 1911, and November, 1918, and article 20, § 17½, as amended November, 1914.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

In Bank.

Proceedings under Workmen's Compensation Act by Louise Kendall for compensation for death of Robert E. Kendall, opposed by C. E. Perry, immediate employer, and the Pacific Gas & Electric Company, as principal employer. Award made by Industrial Accident Commission, and the employers file petitions for writ of review. Order awarding compensation against C. E. Perry affirmed, and that portion of order awarding compensation against the Pacific Gas & Electric Company reversed.

*Decision rendered, June 5, 1919. 181 Pac. Rep. 788.

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William B. Bosley, of San Francisco. and John Coghlan, of Madera, for petitioner Pacific Gas & Electric Co.

Gilbert D. Ferrell, of San Francisco, for petitioner Perry.

Christopher M. Bradley, of San Francisco, for respondents.

WILBUR, J. Two petitions are filed to review the same order of the Industrial Accident Commission, awarding compensation for the death of Robert E. Kendall. The award was made under the provisions of section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), against C. E. Perry as the immediate employer, and against the Pacific Gas & Electric Company as the principal employer.

Both petitioners claim that the evidence is insufficient to show that the relation of employer and employee existed between Perry and the deceased. The only question of fact in the case is whether the relation between Perry and the deceased was that of employer and employee, or that of a copartnership. It appears from the evidence that Perry, as an independent contractor, entered into a contract with the petitioner Pacific Gas & Electric Company to furnish for $20 a day, a five-ton road roller, with a man and necessary gasoline and supplies, for the purpose of rolling the earth that had been filled into a trench in which the gas mains of the petitioning company had been laid. After the making of this contract Perry entered into an arrangement with the deceased by which the deceased operated the roller in question. The deceased was crushed between a heavy automobile truck and the road roller while so engaged, and so injured that he died. In the absence of other evidence the law would imply a contract of employment. That a proposition was made by Perry to the deceased by which the latter was to operate the road roller upon a "fifty-fifty basis" is established by the testimony of Perry and others, and is found by the commission to be a fact. The commission also found that the proposition was never accepted, but was still under consideration at the time of the fatal accident. Perry and his wife testified to conversations with the deceased tending to show an acceptance of Perry's proposition. To rebut this evidence the testimony of decedent's wife, his sister, and other witnesses was received to prove declarations of the deceased made from time to time and up to the day before the accident, to the effect that the deal between Perry and himself had not been consummated. This was hearsay, and petitioner Perry, conceding its admissibility under the express provisions of the statute (Stats. 1917, § 60a), states:

"It may be said that it is for the commission alone to say as to the weight or credibility to be given to this evidence. If so, then the commission may, arbitrarily or otherwise, as in the present case, disregard in toto all evidence heretofore considered by the law and the courts as admissible and entitled to any consideration at all, and base its findings on the sandy foundations of some hearsay evidence, giving to such hearsay as great or greater weight than it would be entitled if it were concededly of the most competent character, without limitation on the commission of any sort, or redress on the part of one aggrieved thereby."

[1] It being granted that the testimony was admissible, it follows, of course, that the weight of the evidence is to be determined by the commission. It is true that, when we depart from well-recognized principles of law concerning the admissibility of evidence, we embark upon a sea of difficulty. This was pointed out in August, 1915, in Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, concerning hearsay evidence. The Legislature, however, has since expressly provided that neither the commission nor its referees—

"shall be bound by the common law or statutory rules of evidence or procedure, * * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common

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law or statutory rules of evidence and procedure." Stats. 1917, p. 871, § 60a.

Similar provisions of the law of 1915 have been considered by this court and upheld. Stats. 1915, p. 1102, § 77a; Western Indemnity Co. v. Industrial Accident Com'n, 174 Cal. 315, 163 Pac., 60; Employers Liability Ass'n Co. v. Industrial Accident Com'n, 177 Pac. 273.

[2, 3] It may be remarked, however, in this connection that the testimony of both Perry and his wife upon which he relies to establish the fact of acceptance by deceased, although permitted by our statute, was inadmissible under the common law, on the ground of their interest in the controversy. 1 Greenleaf on Ev., §§ 326, 328c, 333b, 334, 335, 341; Dawley v. Ayers, 23 Cal. 108. The finding of the commission that the relationship between Perry and the deceased was that of employer and employee is binding upon this court.

[4, 5] The Pacific Gas & Electric Company asks for a review on the additional ground that section 25 of the act of 1917 is unconstitutional, and that therefore the commission had no jurisdiction to entertain the proceeding or to make the award against it. It has been held that the state Constitution did not contemplate a law authorizing an award of compensation by the Industrial Accident Commission against some person other than the employer. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390. It was therefore held that section 30 of the Workmen's Compensation, etc., Act of 1913 (Stats. 1913, c. 176, p. 294) was violative of article 20, § 21, of the Constitution. The Workmen's Compensation, etc., Act of 1917 changes the language of the corresponding section (25), so that instead of using the word "principals" the words "principal employers" are used, and instead of the words "contracting employers, general or intermediate," are used (section 30, Stats. 1917, p. 853); but the change does not meet the constitutional difficulty, for the reason that the terms "employers," "employees" and "employment," as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative. See Employers' Liability Assurance Co. v. Industrial Accident Com'n, 177 Pac. 273, and cases there cited. It would follow, therefore, that the reasons for holding section 30 of the Workmen's Compensation Act of 1913 unconstitutional would apply with equal force to section 25 of the act of 1917. Carstens v. Pillsbury and other cases, supra. Respondent, however, contends that the legislative power was enlarged by the addition of section 17½, art. 20, to the Constitution by an amendment adopted November 3, 1914, and that such amendment authorizes the legislation in question. This amendment was in force at the time of the decision in Carstens v. Pillsbury, supra, decided in 1916, and no contention was then made by respondents that it authorized the legislation in question. It provides that:

"The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

It is contended that the language "and may provide for the comfort, health, safety and general welfare of any and all employees" and the last sentence of the amendment "gives unlimited scope to the Legislature in conferring jurisdiction upon respondent commission." The Workmen's Compensation Act of 1917 provides in section 1:

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"This act and each and every part thereof is an expression of the police power and is also intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty of the Constitution of the state of California. A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employees and those dependent upon them for support to the extent of relieving from the consequences of any injury incurred by employees in the course of their employment, irrespective of the fault of any party," etc.

These recitals in the legislative act by which it is sought to designate the source of constitutional power to enact the statute have no weight other than as an expression of the legislative opinion that the law is constitutional—an inference which arises with equal force from the fact of its enactment. It is sufficient for the purposes of this case to say that section 17½ only purports, so far as here involved, to authorize legislation with reference to employees," and its application, therefore, must be based upon the existence of an employment. The same considerations that led this court to hold unconstitutional the effort of the Legislature to extend the provisions of the Workmen's Compensation Act to relations other than those of employer and employee would apply with equal force to legislation under this section. It is not, therefore, necessary for us, in this action, to further construe section 17½. It is not improper to observe, however, that the printed arguments for and against that amendment, submitted with the proposed amendment, to the people at the election in 1914, are wholly confined to a consideration of the law as affecting the establishment of a minimum wage for women and minors. It is true, of course, that this fact would not limit the plain language of the constitutional provision in question. But, in view of its broad general terms, that fact is worthy of consideration in ascertaining the intent of the people in adopting the amendment. From these considerations it its manifest that no authority is thereby given to impose liability upon third persons for injuries to employees.

Respondent calls our attention to an amendment of section 21, art. 20, adopted at the general election in November, 1918. This amendment completely revises that section. As it was adopted long after the accident in question, it is conceded that it has no application, save, as is contended, that the last paragraph of the amendment has—

"swept away any technical defect which might have existed to hamper the full exercise of jurisdiction by the Industrial Accident Commission under the statute which was in force when the amendment was adopted. The portion of the amendment thus relied upon is as follows: 'Nothing contained herein shall be taken or construed to hamper or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state, or the state compensation insurance fund, the creation and existence of which, *with all the functions vested in them* are hereby ratified and confirmed.'" (Italics ours.)

For the purpose of this case it is sufficient to notice that, so far as the amendment in effect ratifies and confirms existing legislation purporting to vest power in the commission to award compensation against persons other than the employer, such power never was vested in the commission, for the reason that the legislative attempt to vest such power was unconstitutional and void. Carstens v. Pillsbury, supra. The amendment does not attempt to ratify this futile legislation, but only to ratify in the commission "functions vested in them." This amendment did not, therefore, purport to extend the power of the commission beyond that which had theretofore been lawfully vested in them. The fact, if it be a fact, that the commission was exercising the functions provided by the law of 1917 (section 25), that is, that they were in fact awarding compensation to employees against others than their employers, does not

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"vest" such functions within the meaning of the amendment, which must obviously refer to legal authority. It should be observed that the amendment did not attempt to ratify the Workmen's Compensation Act of 1917, but merely to confirm powers already lawfully vested in the commission. This distinction can be best emphasized, perhaps, by calling attention to the difference between the language under consideration and that of the constitutional amendment of October 10, 1911, with relation to the Railroad Commission and the Railroad Commission Act (Const. art. 12, § 22), wherein it was provided as follows:

"The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision. * * *

In the latter case the legislation was expressly ratified and the methed of its interpretation pointed out in the constitutional amendment, while the amendment under consideration merely purports to ratify powers and functions already vested in the commission. If it was proposed to ratify and confirm legislation otherwise unconstitutional, that purpose should have been clearly expressed.

It follows, then, that section 25 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 853) is unconstitutional in so far as it attempts to authorize the awarding of compensation against a third person not an employer, for the same reason that the previous statute was unconstitutional, and that the amendment to section 21 of article 20 of the Constitution does not ratify the legislation condemned as unconstitutional in Carstens v. Pillsbury, supra.

Petitioner Perry also complains that the award was excessive, but, upon the basis of his own testimony that one could work at the business 260 days in a year at $6 to $7 a day, the award was not excessive.

The order awarding compensation against petitioner C. E. Perry is affirmed, and that portion of the order seeking to award compensation against the Pacific Gas & Electric Company is annulled.

We concur: Angellotti, C. J.; Shaw, J.; Lennon, J.; Melvin, J.; Olney, J.

LAWLOR, J. (concurring). I concur specially in the judgment and in what is said on the question whether the relationship of employer and employee existed between C. E. Perry and the deceased. I also concur in the judgment on the constitutional question. This I would not be prepared to do, however, if the questions decided in Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, and Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222, were now presented for the first time. I dissented in those cases principally for the reason that, in my opinion the grant of power to the Legislature (section 21, art. 20, Const.) authorized that body, in order to more fully realize the fundamental objects of the new order of rights and liabilities, to create and enforce a liability against the owner, the general contractor, and the subcontractor as well as the immediate employer of the injured workman. To this view I shall adhere, but, the contrary opinion having become the settled law of the state, I think the decision reached herein must be accepted.

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SUPREME COURT OF COLORADO.

INDUSTRIAL COMMISSION OF STATE OF COLORADO ET AL.

v.

JOHNSON. (No. 9389.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—FINDINGS BY COMMISSIONS—CONCLUSIVENESS.

Findings of fact by the Industrial Commission in a Workmen's compensation proceeding, having competent testimony to support them, are conclusive.

(For otner cases, see Master and Servant, Dec. Dig. § 417[7].)

Scott, J., dissenting.

En Banc.

Error to District Court, City and County of Denver.

Workmen's compensation proceedings by Guy M. Johnson against the Electrical Supply & Construction Company, employer, and the London Guarantee & Accident Company, insurance carrier. Finding of the Industrial Commission being adverse to claimant, he instituted suit in the district court, which rendered judgment in his favor, and the Commission, employer, and insurance carrier bring error. Reversed and remanded, with instructions.

Leslie E. Hubbard, Atty. Gen., John L. Schweigert, Asst. Atty. Gen., and Walter E. Schwed, William E. Hutton, and Bruce McCay, all of Denver, for plaintiffs in error.

Charles F. Morris, of Denver, for defendant in error.

BAILEY, J. The Industrial Commission of Colorado. hereinafter called the commission, seeks to have reviewed on writ of error a judgment of the district court in favor of defendant in error, Guy M. Johnson, hereinafter called the claimant, by which he was awarded compensation at the rate of eight dollars per week so long as disabled, or until he had received the maximum amount of $2,080.00, provided for in such cases.

The claimant, while in the scope of his employment was injured in May, 1916, and at a hearing before the commission on December 20, 1916, it was found that he was neither totally nor permanently disabled, and was allowed six weeks compensation, in addition to that which he had already been paid, for temporary disability. On January 23, 1917, having made no application for a rehearing, the claimant filed a complaint in the district court for a review of the findings of the commission. The commission filed its answer thereto, and the other defendants, plaintiffs in error here, interposed a general demurrer and also an answer to the merits. The demurrer was overruled and after a full hearing the cause was remanded to the commission. An additional hearing was had beginning on July 11, 1917, which was continued from time to time to allow claimant to receive further medical attention. His trouble consisted of an injury to his left foot, which he contended was permanent, but which physicians testified would yield to treatment.

A final hearing was had on October 9, 1917, at which time three physicians testified as to the claimant's physical condition. One physician,

*Decision rendered, June 2, 1919. 181 Pac. Rep. 977.

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a specialist, testified that a minor operation, involving no risk, would greatly benefit him. The others testified that the disability then present amounted to approximately twenty-five per cent. of total disability of his left foot at the ankle, and all agree that his condition would improve with proper treatment. The insurance company then offered to provide claimant with one month's treatment, involving the minor operation above mentioned, free of cost to him. The commission ordered this treatment and directed that compensation should cease until such time as Johnson had undergone such operation, to which he refused to submit, and thereupon and on October 20, 1917, the commission entered its findings and award by which claimant was found to have sustained a twenty-five per cent. total disability of the use of his left foot at the ankle, and that he was then able to work. The amount fixed by law to be paid for such disability having been already exceeded, no further compensation was awarded.

The claimant, without applying for a rehearing, filed a motion in the same suit previously filed by him in the district court, to reopen the case, and to require the return of the files of the commission to the district court. This motion was sustained and claimant was permitted to file a supplemental or amended complaint. To this a demurrer was interposed, which was overruled. The insurance company then answered, and by stipulation the answer of the commission to the original petition was allowed to stand as its answer to the amended complaint.

On February 26, 1918, a hearing was had upon the issues as made. No further evidence was taken, but the court found that the order entered by the commission was not supported by its findings of fact and entered judgment as hereinabove stated.

It is urged that the district court had no jurisdiction to enter any order in the cause, because the proper procedure was not followed in taking the case before it, and that, in any event, the award is in conflict with the findings of fact of the commission. The claimant contends that the circumstances of this case made the procedure adopted by him necessary, as the only way open to bring the case before the district court. It is not necessary to determine this case upon a question of procedure, as it conclusively appears from the record that in entering the award the district court absolutely ignored and refused to recognize the findings of fact of the commission, and reached a conclusion and rendered judgment contrary to and plainly inconsistent with such findings.

After an exhaustive hearing, continued from time to time in order to give the claimant every opportunity to substantiate his claim, the commission found that he had sustained an injury to his left foot, which resulted in permanent disability of that member amounting to twenty-five per cent. of the total loss of the foot at the ankle, and further found that in other respects he was at that time able to do ordinary work. There is ample competent testimony to support and uphold these findings. In fact, the evidence as to the physical condition of the claimant is practically uncontradicted, and no other findings could be logically adduced or result from the testimony.

This court, in Passini v. Industrial Commission et al., 171 Pac. 369, in discussing the effect of findings of fact by the commission, at page 370, said:

"This court may consider only the legal question of whether there is evidence to support the findings, and not whether the commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the commission, where supported by evidence, or reasonable inference to be drawn therefrom."

And further, on page 371, it is said:

"The purpose of the act is to confine the settlement of compensation cases to the commission itself, so far as is consistent with justice."

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As there is manifestly nothing in the record to justify the setting aside of the findings of the commission the judgment of the trial court will be reversed and the cause remanded with instructions to the trial court to approve, and accept, the findings of the Industrial Commission, and enter judgment accordingly.

Judgment reversed and cause remanded, with instructions.

Scott, J., dissents.

SUPREME COURT OF ILLINOIS.

BAUM

v.

INDUSTRIAL COMMISSION ET AL. (No. 12543.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ARISING OUT OF EMPLOYMENT.

While there must be some causal relation between the employment and the injury for which compensation is sought, it is not necessary that the injury be one which ought to have been foreseen or expected.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SCOPE OF EMPLOYMENT.

Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where an assistant cutter in a shirt waist factory was fatally wounded by strikers, while trying to save his employer and other employees from injury, the injury arose "out of and in the course of his employment," within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE—ADMISSIBILITY.

In a proceeding before the Industrial Commission to recover compensation for the death of an employee killed by strikers it was error to prove by parol the contents of a letter received by deceased from the union, demanding that he sign up to prevent the strike.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW—HARMLESS ERROR.

In a proceeding before the Industrial Commission to recover compensation for the death of an employee killed by strikers, error in proving by

*Decision rendered, June 18, 1919. 123 N. E. Rep. 625.

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parol a letter from the union demanding that deceased sign up was harmless, in view of other competent evidence showing the existence of the strike.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION —HARMLESS ERROR—EVIDENCE.

In a proceeding before the Industrial Commission to recover compensation for death of an employee killed by strikers, it was not prejudicial error to admit opinions that deceased was protecting the employer's life and property; where there was sufficient competent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW—POWERS OF CIRCUIT COURT—MONEY JUDGMENT.

Under Workmen's Compensation Act, § 19, it is error for the circuit court, on affirming award by Industrial Commission, to direct payment of the award and order execution thereon.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Constance Tomczyk to recover compensation for the death of Edward Tomczyk, opposed by Simon M. Baum, employer. The award of the Industrial Commission was affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

John Clark Baker, of Chicago, for plaintiff in error.

Joseph L. Lisack, of Chicago (John H. McAuliffe, of Chicago, of counsel), for defendant in error.

THOMPSON, J. This writ of error is brought to review a judgment of the circuit court of Cook county confirming an award by the Industrial Commission against Simon M. Baum, plaintiff in error, of compensation for the death of Edward Tomczyk, who died February 25, 1917, from injuries received February 16, 1917, in a difficulty caused by some strikers raiding the factory where deceased was working. The questions raised are whether the death of Edward Tomczyk arose out of his employment, whether there was error in the admission of certain evidence, and whether the circuit court, in confirming the award of the Industrial Commission, erred in entering a money judgment and ordering execution.

Deceased was employed by plaintiff in error, doing business as the Nora Shirt-Waist Company, as an assistant cutter in his factory located at Milwaukee avenue and Oakley boulevard, in the city of Chicago. The workroom of the factory is triangular in shape, there being about 5,000 square feet of floor space in the room. The entrance to this workroom is from Milwaukee avenue through an outer door, down a passageway, and through a second door. At the right of the passageway between the avenue and the workroom was Baum's office. At the time of the difficulty there were employed in the workroom 2 men and about 25 women. Plaintiff in error manufactured wash dresses, shirt waists and other like wash garments. As assistant cutter it was the duty of deceased to lay out goods and cut same with a knife or a power-driven machine. It appears that on January 13, 1917, plaintiff in error received a letter from the International Garment Workers' Union, demanding that he sign up with the union to avoid a strike and other difficulty. On February 14 a strike was called by this union, which strike was more or less general throughout the city of Chicago. None of the employees of plaintiff in error

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were members of this union, and there was no strike at this factory, and no trouble existed between employer and employees. Two days later, at about 11:45 a. m., 20 or 30 striking members of this union, men and women, rushed through the passageway, past the office, and into this workroom, calling upon the employees of plaintiff in error to strike. Plaintiff in error was in his office at the time, and when he saw the crowd rushing into his factory he ran to the rear of his office and tried to prevent the crowd from entering his workroom. He seized a hammer, which was taken away from him by the strikers. He then tried to reach his telephone to call the police, but was prevented by the strikers. As the crowd forced its way past plaintiff in error, Tomczyk walked around from his cutting table, where he was working, and tried to hold them back. The plaintiff in error was standing about 4 feet away from Tomczyk, and there were about 6 male strikers standing between them. The remaining strikers, men and women, were crowded around plaintiff in error, Tomczyk, and the forelady, all the women employees of the factory having fled in a panic. In the course of the riot Tomczyk was stabbed, and cried out, "Baum, I am cut." It was from this wound that he died. The strikers left immediately, throwing bricks through the plate glass windows as they went.

The first question is whether Tomczyk's injury, which was received in the course of his employment, arose out of his employment. The words "arising out of" have reference to the cause or origin of the accident, and seem to indicate that the accident must happen out of the transaction of the business in which the workman is engaged. That would include any accident which might naturally result from the manner in which the business is carried on and which would be considered incidental to the employment itself. The injury was clearly a mishap, occurring outside of the usual course of events, and was an emergency which arose while Tomczyk was engaged in his work. It is well argued that such a situation could hardly have been contemplated by either the employer or the employee when Tomczyk entered the employment of plaintiff in error. On the other hand, when plaintiff in error failed to sign the agreement with the union, it was certain to cause the members of the union to use some measure to compel compliance with their demands. It was generally known that there was a strike in the city of Chicago, and this fact was known to the plaintiff in error. Unfortunately, during the course of a strike, and in the excitement of events which occur during a strike, trouble quite frequently arises. In view of the general conditions and events that were happening in the immediate vicinity of the factory of plaintiff in error, it can hardly be said he should not, as a reasonable person, expect some difficulty with the strikers.

[1, 2] While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment. Such was our holding in Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530. Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

It is conceded that Tomczyk was a peaceable and law-abiding citizen. It is also conceded that the strikers rushed into the workroom without any warning and that plaintiff in error tried to eject them. The evidence shows that there was great excitement in the workroom, and that the women employees fled, screaming, to the back of the room. Nothing was said between the plaintiff in error and Tomczyk. Tomczyk, seeing his employer and his fellow employees in apparent danger, came to the rescue. He was assisting his employer in the defense of his person and his property, and was acting in defense of his fellow employees, all of whom were women. We have held that it is the duty of an employee

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to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999. That the fellow employees of deceased were not actually in danger of losing their lives cannot change the rule. The danger was clearly apparent to Tomczyk. He acted as any man would have acted under the circumstances. The rioters had rushed in without warning and threw the women employees into a panic. It was up to deceased to act, or to abandon the workroom and its occupants to trespassing strangers, apparently bent upon doing damage to whatever came in their path. The situation was an unusual and unforeseen one, and called for quick action. From every point of view it was the duty of deceased to defend himself and his employer, and to assist his employer in defending the persons of his women coworkers. Where the trouble arises out of the employer's work, and as a result of it one of the trespassers injures an employee who is defending his employer's business, it may be inferred the injury arose out of the employment.

[3] An assault arises out of one's employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circumstances, are liable to attack him. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 221. Such was the situation in this case. Deceased was assaulted, not for anything he had done, but because he was in the employ of the plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are therefore of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.

[4-6] It appears that plaintiff in error received a letter from the union demanding that he sign up with them to prevent a strike. It was attempted to prove the contents of this letter by oral testimony. This was error. When an arbitrator hears evidence, it must be evidence that is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding. Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627. There was, however, competent evidence showing the existence of the strike, and no damage was done plaintiff in error by this ruling. Neither was there any damage done when the plaintiff in error expressed the opinion that deceased was protecting the employer's life and property. He had testified as to what was being done by deceased, and there was sufficient competent evidence to sustain the finding of the commission.

[7] It is contended by plaintiff in error that the circuit court erred in entering a judgment, which not only confirmed the award of the commission, but also directed the payment of the amount of the award and ordered execution. The proceedings in cases of this character are purely statutory, and it is a settled rule that the requirements of the statute must govern and control them. These proceedings were under paragraph (f) of section 19 of the Compensation Act (Laws 1913, p. 349), and the only authority of the court under this paragraph is to confirm or set aside the decision of the Industrial Board. From a consideration of the whole act, it would appear that the Legislature intended that the employer might protect himself against a judgment for payment of the award by performing certain optional conditions. Paragraph (g) of the same section provides that when the proceedings are under that section "no judgment shall be entered in the event the employer shall file with the said board its bond with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of the decision or the said decision upon review shall be affirmed." Paragraph (f) of the same section (the one under which these proceedings are brought) provides that the writ of certiorari shall not issue until the employer has filed with the circuit clerk "a bond conditioned that if he

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shall not successfully prosecute said writ or said suit he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court." Such a bond was filed in this case. These provisions to prevent judgments are made to avoid incumbering the employer's property with accumulative liens that in many cases would not be discharged for many years and might run for the life of the employee. These judgments might accumulate until the defect in the title of the employer's real estate would make it unmarketable. The employee is fully protected by the bond required by the statute. The court in this case had only such power or certiorari as the statute gave, and that was to confirm or set aside the decision of the commission. There is nothing in the statute to authorize a judgment directing the payment of the amount of the award and ordering execution to issue.

The judgment is reversed, and the cause remanded, with directions to enter an order confirming the decision of the Industrial Commission.

Reversed and remanded, with directions.

SUPREME COURT OF ILLINOIS.

HEINZE ET AL.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12639.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY IN COURSE OF EMPLOYMENT—TEAMSTER.

In a proceeding under the Workmen's Compensation Act, evidence *held* to show that a teamster's injury arose out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES "ARISING OUT OF EMPLOYMENT."

If the employee is injured while in the performance of any of his duties, such injury arising out of his employment within the meaning of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM—EMPLOYERS DOING BUSINESS UNDER TWO PARTNERSHIP NAMES.

A claim under Workmen's Compensation Act against named individuals, copartners conducting two different lines of business under different partnership names, descriptive of the character of business, is not invalid because made orally to one of them, nor because claim stated they were doing business under such partnership names.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

*Decision rendered, June 18, 1919. 123 N. E. Rep. 598.

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7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD—PARTNERSHIP NAME—DESCRIPTIO PERSONÆ.

An award by the Industrial Commission against employers conducting two different lines of business under different partnership names, descriptive of the character of business, is not rendered invalid by the addition of a descriptive partnership name; it being merely descriptio personæ and surplusage.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings by Antonia Krings under the Workmen's Compensation Act for an award on account of the death of her husband, Fred Krings, opposed by Frederick G. Heinze and another, as copartners, employers, and the General Accident Liability Insurance Company, insurer. The Industrial Commission confirmed the findings and award of the arbitrator, and the employers and insurer sued out a writ of certiorari and took the record to the circuit court of Cook county, where the award was affirmed, and the trial judge certified the cause as one proper for review by the Supreme Court. Judgment of the circuit court affirmed.

Edward L. England, of Chicago (Samuel J. Nordorf, of Chicago, of counsel), for plaintiffs in error.

Shaeffer & Foster, of Chicago (George H. Foster, of Chicago, of counsel), for defendants in error.

DUNCAN, J. Antonia Krings filed an application on November 23, 1916, for an award under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) on account of the death of her husband, Fred Krings, resulting from injuries alleged to have been received by him arising out of and in the course of his employment on June 7, 1916. Frederick G. Heinze and Ernest Weinsheimer, copartners doing business as F. Heinze & Co., were named as defendants in the application. At the hearing before the arbitrator January 18, 1917, upon leave granted, the application was amended by adding as parties defendant Frederick Heinze and Ernest Weinsheimer, doing business as the Weinsheimer Teaming Company. The arbitrator dismissed as to Frederick Heinze and Ernest Weinsheimer, doing business as F. Heinze & Co., and entered an award against them as co-partners doing business as the Weinsheimer Teaming Company. The Industrial Commission confirmed the findings and award of the arbitrator, and plaintiffs in error sued out a writ of certiorari and took the record to the circuit court of Cook county. The award of the commission was affirmed, and the trial judge certified that the cause, in his opinion, is one proper to be reviewed by this court.

The deceased on the day of his injury was in the employ of plaintiffs in error, Frederick G. Heinze and Ernest Weinsheimer, as a teamster. Plaintiffs in error were engaged in business as commission merchants, and also had teams and wagons with which they did hauling for themselves and also for others. They operated as commission merchants under the firm name of F. Heinze & Co. They did their hauling for others under the firm name of Weinsheimer Teaming Company, kept the hauling account separate from the commission account, and paid all bills of the teaming department with checks drawn on the account of the Weinsheimer Teaming Company, except when there was no one present to sign checks, when payments would be made from the money drawer. Both lines of business were conducted from the same office, the same bookkeeper kept the accounts for both, and the reason the two lines were carried on under different names was to obtain hauling from other commission merchants who on account of business jealousy would not give

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them the hauling if they knew F. Heinze & Co. were doing the teaming. The check to pay for the liability insurance covering teamsters and their helpers was drawn against the account of the Weinsheimer Teaming Company and signed "F. Heinze." The teams were owned and the business carried on by plaintiffs in error, and no one else was connected with them. It was the duty of the deceased, as a teamster for plaintiffs in error, to go to firms on South Water Street, Chicago, and pick up business from customers. The injury from which his death resulted was caused by a fall in the doorway of G. W. Randall & Co., commission merchants, who were customers of plaintiffs in error's teaming department, on West South Water street. It was about noon when the deceased fell, having slipped on a runway at the door, having about a foot and a half incline to six feet in length. His kneecap was fractured. He was taken to a hospital, and medical aid was rendered by a physician of his own selection, and later by another chosen by his wife. An infection of the knee made an operation necessary. General septicemia developed, and the deceased died on July 12, 1916. Some time in October, 1916, Mrs. Krings and her attorney, George H. Foster, went to the business quarters of the plaintiffs in error, and the attorney told Heinze that they were making their claim against Frederick Heinze and Ernest Weinsheimer, doing business as F. Heinze & Co. and as Weinsheimer Teaming Company, or in whatever name they were doing business.

[1-3] Plaintiffs in error's first contention is that the injury to and death of the deecased did not arise out of and the in the course of his employment. This contention is without merit. It clearly appears that a part of the business of the deceased was to go to customers of his employers and pick up business; that Randall & Co. were such customers; that he was compelled to go through Randall & Co.'s building to reach Spahns, another customer of plaintiffs in error. The wagon and team that he was using had been left in the alley, and the reasonable inference to be drawn from the facts proven is in complete accord with Weinsheimer, who testified, "I suppose he went back there to see if he could get a load." The record in other striking particulars overthrows the contention made by plaintiffs in error. J. A. Bloomingston, the attorney representing the General Accident & Liability Insurance Company, stipulated on the hearing before the arbitrator that the injury arose out of and in the course of the employment, and E. C. Ferguson, since deceased, who was then representing plaintiffs in error, agreed to that stipulation and thereby bound plaintiffs in error. Weinsheimer also testified that deceased was in the course of his duties when he was hurt. The rule has been announced and frequently applied that, if the employee is injured while in the performance of any of his duties, such injury arises out of his employment. Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808. The evidence fairly tends to show that the injury arose out of the employment, and the stipulations of their counsel and the admission of Weinsheimer estop plaintiffs in error from now contending otherwise.

[4-7] It is next insisted that no claim for compensation was made in apt time. This contention is based upon the fact that the application against plaintiffs in error as the Weinsheimer Teaming Company was not made until January 18, 1917, more than six months after the injury and the date of the last payment of compensation, and that no claim had been made against them, as such teaming company, prior to that time. This contention is not supported by the record, but, on the contrary, is overcome by the positive testimony of Attorney Foster to the effect that he told Heinze that they were claiming against them as F. Heinze & Co., the Weinsheimer Teaming Company, or in whatever name they were doing business. The claim for compensation may be made orally, as in this case. Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979; Moustgaard v. Industrial Com., 287 Ill. 156, 122 N. E. 49. The

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claim for compensation was against F. Heinze and Ernest Weinsheimer. A partnership is not a legal entity, separate and distinct from the persons composing it (Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741); and it makes no difference that the same parties are engaged in two different lines of business under different partnership names, there is in law but one partnership (Campbell v. Colorado Coal & Iron Co., 9 Colo. 60, 10 Pac. 248). The claim filed against the partners, therefore, was a valid claim, and the words describing the character of business done by them are merely words descriptio personæ and surplusage. For the same reason the contention that the award of the commission and the judgment of the court are erroneous because not against Frederick G. Heinze and Ernest Weinsheimer individually cannot be sustained. The legal effect of the award and the judgment is to bind plaintiffs in error as individuals, and the addition of words descriptio personæ cannot be held to render an award and judgment erroneous.

For the reasons above stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

OTIS ELEVATOR CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12542.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE AND CLAIM OF INJURY.

In view of Workmen's Compensation Act, § 24, requiring notice of accident to be given within six months after the injury or cessation of payments, and section 8, par. (d), giving an employee who has returned to the employment wherein he was injured 18 months after his return to give notice of injury, an employee, who does not return to his former service within 6 months after the injury or cessation of payment, and who does not within such time claim compensation, can claim no benefit under paragraph (d), as by failing to claim compensation he has waived his rights thereto.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—TIME FOR MAKING CLAIM FOR INJURY—RETURN TO EMPLOYMENT—STATUTES—CONSTRUCTION.

Workmen's Compensation Act, § 8, par. (d), giving an employee, who has returned to his employment wherein he was injured, 18 months to make claim for injury, cannot be construed as applying only to those employees who remained in their former employment for a period of 18 months, or as meaning that, in case they cease to be so employed within that time, their claims must be filed within 6 months of the date of which such employment ceased.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

*Decision rendered, June 18, 1919. 123 N. E. Rep. 600.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW ON CERTIORARI—ENTRY OF MONEY JUDGMENT.

On review by certiorari of a proceeding under the Workmen's Compensation Act, the circuit court has authority only to affirm the findings and award of the Industrial Commission, or to set it aside and enter a decision justified by law, or to remand the case for further proceedings in view of Workmen's Compensation Act, § 19, but it cannot enter a money judgment and order execution to issue thereon.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Ernest J. Wayner, opposed by the Otis Elevator Company, employer. An award was confirmed by the Industrial Commission, affirmed by the circuit court on certiorari, and the employer brings error. Reversed and remanded, with directions.

John Clark Baker, of Chicago, for plaintiff in error.
William R. Jordan, of Chicago, for defendant in error.

STONE, J. The circuit court of Cook county affirmed the award of the Industrial Commission of Illinois in favor of the defendant in error, Ernest J. Wayner, for injuries received by him while in the employment of the plaintiff in error.

The material facts in the case are stipulated by counsel for the respective parties in interest, to the effect that both parties were under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152h) and subject to its provisions, and that the injury on August 11, 1913, arose out of and in the course of the employment; that Wayner was under total disability, on account of said injury, from August 11, 1913, until March 15, 1914, at which time he returned to work for the plaintiff in error and continued to work thereafter for 6 weeks, at which time he was discharged; that compensation as provided by said act was paid by the plaintiff in error for such disability to March 15, 1914; that after Wayner's return to work he was unfit and unable to perform his usual services, and for that reason was directed to do other kinds of work during said 6 weeks; that at the end of the 6 weeks following March 15, 1914, Wayner had not fully recovered. Formal claim for compensation was filed with the Industrial Commission July 23, 1915, which date is within 18 months after Wayner's return to work for his original employer, the plaintiff in error. An award was made by the arbitrator in his favor in the sum of $1,500 for a period of total and a period of partial disability, which was confirmed, on review, by the Industrial Commission. The circuit court of Cook county on certiorari affirmed the award, entered judgment therefor, and directed the issuance of an execution for its enforcement.

It is contended by plaintiff in error that the claim for compensation, having been filed more than 6 months subsequent to the last payment of compensation, is barred by the limitation of the Workmen's Compensation Act; that the claimant was not continuously in the employment of the plaintiff in error for 18 months subsequent to his return to work, and therefore the limitation provision of the statute is not applicable under the facts in this case; that the circuit court erred in entering judgment on the award and directing that execution issue thereon. It is contended by the defendant in error, Ernest J. Wayner, that having returned to work for the original employer, even though at a different kind of work, the provisions of paragraph (d) of section 8 of the Workmen's Compensation Act apply to this case, although claimant did not continuously remain

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in the employment for the period of 18 months subsequent to such return.

It is urged by plaintiff in error in support of his first contention that the Legislature intended by paragraph (d) of section 8 of the Workmen's Compensation Act that the limitation of 18 months for filing claim, where the employee has returned to the service of the employer by whom he was employed at the time of the injury, should apply only to those cases where the employee remained in the employment of said employer during the period of 18 months, and in the event of his leaving such employment within that time that claim for compensation must be filed within 6 months from the date on which he left such employment, contending that under such circumstances section 24 of the act should apply. Section 24, in so far as it refers to said question, is as follows:

"No proceedings for compensation under this act shall be maintained unless notice of the accident has been given the employer as soon as practicable, but not later than thirty days after the accident. In cases of mental incapacity of the employee, notice must be given within six months after such accident. No defect or inaccuracy of such notice shall be a bar to the maintenance or proceedings by arbitration or otherwise by the employee, unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy. Notice of the accident shall in substance apprise the employer of the claim of compensation made and shall state the name and address of the employee injured, the approximate date and place of the accident, if known, and in simple language the cause thereof; which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: Provided, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice principal in the enterprise. No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made, within six months after such payments have ceased."

Paragraph (d) of section 8, in so far as it applies to the question here, reads as follows:

"In the event the employee returns to the employment of the employer in whose service he was injured, the employee shall not be barred from asserting a claim for compensation under this act: Provided, notice of such claim is filed with the Industrial Board within eighteen months after he returns to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

Plaintiff in error contends that if a strict construction be given to the words, "in the event the employee returns to the employment of the employer in whose service he was injured," it would follow that such employee might return in 5 years and still have 18 months thereafter in which to make claim and start proceedings, and that if such construction be given to paragraph (d) it becomes unconstitutional, as denying equal protection of the laws by making an arbitrary distinction between an employee who returns to the employment with his former employer and an employee who does not return to said employment, by giving the former 18 months in which to file his claim while the latter has but 6 months; that such distinction is not based on any real difference in the circumstances.

[1] It is a fundamental rule of construction of statutes that the intention of the Legislature is to be sought and to be given effect where that can be done without contravening established rules of law; that the intention is to be gathered from the entire act when all its parts are

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construed together, and from the necessity or reason for the enactment when such can be gathered from the act. As was said in the case of People v Harrison, 191 Ill. 257, 61 N. E. 99:

"In determining the meaning of a statute the court will have regard to existing circumstances or contemporaneous conditions, and also to the objects sought to be obtained by the statute and the necessity or want of necessity for its adoption."

The purpose of construction is to find and give effect to such intention, and in seeking for such intention we are to consider, not only the language used by the Legislature, but also the event to be remedied and the object to be obtained. People v. Flynn, 265 Ill. 414, 106 N. E. 961; Maiss v. Metropolitan Amusement Ass'n, 241 Ill. 177, 89 N. E. 268.

[2] An examination of paragraph (d) of section 8, together with section 24, discloses that said paragraph is made an exception to the general provision in section 24, it being the evident intention of the Legislature to avoid any advantage being taken of the employee by reason of the relation reassumed with his former employer. In making this exception the Legislature has fixed the period of limitation for filing claims at 18 months. Counsel for plaintiff in error urges that this period is unreasonable, for the reasons: First, that the employee may have advantage of this provision even though he does not return to employment for a period of 5 years; and, second, because it gives to such employee a protection not given to one who does not return to such service. The first objection is untenable, for the reason that under section 24 the employee who does not return to his former service must file his claim for compensation within 6 months where no payments have been made or within 6 months after the last payment. It cannot be said that paragraph (d) should be held to apply to an employee who had neither returned to work nor made claim for compensation within 6 months after his injury or after cessation of payments. In other words, the employee who does not return to his former service within a period of 6 months after the injury or after the cessation of payments, and who does not within said period or periods make claim for compensation, can claim no benefit under paragraph (d), as he has by such failure to make claim for compensation waived all right thereto.

Counsel for plaintiff in error also contends that in the computation of time paragraph (d) is to be construed as applying only to those employees who remain in their former employment for a period of 18 months, and that in case they cease to be so employed within that time their claims must be filed within 6 months of the date on which such employment ceased. In the first place, such a construction would be doing violence to the plain language of the act by reading into it a limitation of 6 months under certain conditions, neither limitation nor condition being contained or referred to in the act. As was said in Wangler Boiler Works v. Industrial Com., 287 Ill. 118, 122 N. E. 366:

"Courts have no power to put a limitation upon a right legally given by the Legislature, unless by a fair construction of the act it can be said such limitation was in furtherance of legislative intent."

[3] To construe paragraph (d) as limiting the right of the employee to a period of 6 months in which to file claim for compensation in case of his return to his employment with his previous employer would be reading into the act a provision which is nowhere in the act, and which neither the circumstances surrounding the same as shown in the act nor the purpose thereof would warrant. It might be added that such a construction, instead of being a benefit to the employee might well prove a detriment, as in a case where the employee remained, after his return to work, for a period of 17 months and then quit such employment. Under the construction contended for by plaintiff in error, he still would have 6 months, or a total of 23 months, instead of 18 months, in which to file a claim.

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[4] Nor can we agree with the contention of counsel for plaintiff in error that this question of the period of time in which claim may be filed renders said act unconstitutional, as denying equal protection of the law. The circumstances of the employee who does not return to his employment are not the same as those where one does so return, as the relation of employer and employee does not exist in the former case. The Legislature might well have conceived that, under circumstances affected by the fact that the employee has returned to service with his former employer, he is to be given an additional period of time in which to make claim. While it is true an employee may return to his employment, under paragraph (d), for a period of a few days or a few weeks, and thereby gain the advantage of additional time in which to file his claim, yet such is the plain provision of the act, and such act lies within the power of the Legislature to pass.

Plaintiff in error's second contention is that the circuit court erred in entering a money judgment and ordering execution to issue thereon. It appears from the record that the proceedings in the circuit court were by writ of certiorari to review the findings and award of the Industrial Commission, and these proceedings were brought under clause 3 of paragraph (f) of section 19, which provides, in part, as follows:

"No such writ of certiorari shall issue * * * unless such one shall * * * file with the clerk of said court a bond conditioned that if he shall not successfully prosecute said writ * * * he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court."

Paragraph (g) of the same section provides for the proceedings by which a money judgment may be entered against the employer, and applies only where no proceedings for review of the decision of the Industrial Commission have been taken, and where there has been a refusal to pay an award upon which no review has been sought. Concerning proceedings under paragraph (g), it is provided:

"Judgment shall not be entered until fifteen days' notice of the time and place of the application for the entry of judgment shall be served upon the employer by filing such notice with the Industrial Board; which board shall, in case it has on file the address of the employer or the name and address of its agent, upon whom notices may be served, immediately send a copy of the notice to the employer or such designated agent; and no judgment shall be entered in the event the employer shall file with the said board its bond, with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of the decision, or the said decision, upon review, shall be affirmed."

[5] The only authority which the circuit court had on review by certiorari was to affirm the findings and award of the Industrial Commission or to set aside the same and enter such a decision as is justified by law, or remand the cause to the commission for further proceedings. Peabody Coal Co. v. Industrial Com., 287 Ill. 407, 122 N. E. 843. It is the intention and purpose of the Workmen's Compensation Act that a bond shall be given by the employer on petition for review by certiorari, as was done here, so that in case the findings and award of the commission are affirmed the employee shall be fairly protected by such bond, thereby rendering the entering of a money judgment unnecessary. If this were not true and a money judgment were entered against the employer, in cases where payments are to cover a period of years it would result in affecting the title to property held and owned by the employer, and subject him to an inconvenience and damage wholly unnecessary. The employee is amply protected by the bond.

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The circuit court therefore erred in entering a money judgment and in ordering execution. That court should have entered an order affirming the award of the Industrial Commission, and that the cost of the certiorari proceedings be paid by the petitioner therein. For this error the judgment is reversed and the cause remanded, with directions to the court to enter a judgment in conformity with the views herein expressed.

Reversed and remanded, with directions.

SUPREME COURT OF ILLINOIS.

MOLL

v.

INDUSTRIAL COMMISSION ET AL. (No. 12674.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —ILLEGAL EMPLOYMENT.

Under Workmen's Compensation Act, § 3, declaring the business of mining to be extrahazardous, and Act to Regulate the Employment of Children, § 6, making it illegal to employ in any extrahazardous employment a child under 16 years, a boy under 16 employed by a clay-mining company was illegally employed, and the Compensation Act did not apply to him.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

Error to Circuit Court, La Salle County; Samuel C. Stough, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Frank Moll, the employee, opposed by the Illinois Clay Products Company. Compensation was denied by the arbitrator and Industrial Commission, and the decision affirmed on certiorari by the circuit court, which certified the case to the Supreme Court for review. Judgment of the circuit court affirmed.

J. E. Malone, Jr., of La Salle, for plaintiff in error.

Sonnenschein, Berkson, Lautmann & Levinson, of Chicago, for defendants in error.

FARMER, J. Frank Moll was employed June 19, 1916, by Arthur Corbin, a farmer, to work on the farm at a wage of $22 per month, with board and lodging. He did the ordinary farm work on Corbin's farm until August 16, 1916, when Corbin made a contract with the Illinois Clay Products Company to strip or remove the top surface of earth from a stratum of clay the Clay Products Company was mining and shipping to market. Moll was paid by Corbin the $22 per month wages while he worked on the job at the Clay Products Company's mine and Corbin was paid by the company. The removal of the top surface from the clay was done under and in accordance with the directions of the Clay Products Company, with plows and scrapers furnished by the company. Moll began work at the company's mine August 16, 1916, and continued to work there until September 19th. Most of the time he was engaged in stripping earth from the clay, but occasionally, when directed by officers

*Decision rendered, June 18, 1919. 123 N. E. Rep. 562.

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of the company to do so, did some other kind of work about the mine. While engaged in the work at the company's mine Moll lodged and boarded at Corbin's and performed chores there mornings and evenings. On the 19th of September, while driving a team hitched to a plow which Jones, president of the company, was riding to make it sink deeper in the ground, a chain attached to the whiffletree broke, and the whiffletree flew back, striking Moll's right leg, breaking both bones above the ankle. A physician was called by the president of the company, and Moll was removed to a hospital, where the fracture was set and where he could receive proper attention. He remained in the hospital until November 24th, and claims he was totally disabled until the 10th of May following, and that there is a permanent partial disability. He made application for an award under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) against the Clay Products Company. Moll was not 16 years old at the time of his injury. He was born October 26, 1900, and was 16 years old the 26th of October following his injury on the 19th of September. The arbitrator who heard the application denied it, and on review by the Industrial Commission that body affirmed the decision of the arbitrator. The cause was removed to the circuit court for review by certiorari. That court affirmed the decision of the Industrial Commission and certified the case was one proper to be reviewed by this court.

At the hearing before the arbitrator it was admitted defendant in error and its employees were under and subject to the Workmen's Compensation Act, but it was and is denied that plaintiff in error was an employee of defendant in error; the claim being that he was the employee of an independent contractor. Liability to pay compensation was also denied on the further grounds that the employment of the plaintiff in error at the time of his injury was casual, and also because he was under 16 years of age and was engaged in work he could not legally be employed to do.

Plaintiff in error contends: (1) That he was an employee of defendant in error at the time of his injury; (2) that, if he was not, then, under section 31 of the Workmen's Compensation Act, defendant in error is liable because of its failure to require Corbin to insure his liability to pay compensation; (3) that the employment was not casual; (4) that the statute in force at the time of the injury did not prohibit plaintiff in error's employment in the work he was doing.

Plaintiff in error contends that the statute concerning the employment of child labor in force when the injury occurred did not make the employment of minors under 16 years of age illegal in such industries as that of defendant in error; that prior to 1917 the statute enumerated a large number of employments in which children under 16 were forbidden to be employed, and mills were not mentioned among the prohibited employments. By amendment in 1917 mills were specifically mentioned among the forbidden employments, and counsel says the word "mill" embraces defendant in error's plant and occupation, employment in which of minors under 16 years of age was not illegal before 1917. Plaintiff in error insists that prior to 1917 there was a group of employments declared extrahazardous by the Workmen's Compensation Act not included in the occupations prohibited by the Child Labor Act (Hurd's Rev. St. 1917, c. 48, §§ 20-20o), and that this group embraced employment in the plant of defendant in error.

The act of 1897 to regulate the employment of children in Illinois (Laws of 1897, § 6, p. 91; Hurd's Stat. 1917, § 6, p. 1422) reads:

"No child under the age of sixteen years shall be employed, or permitted or suffered to work by any person, firm or corporation in this state at such extrahazardous employment whereby its life or limb is in danger, or its health is likely to be injured, or its morals may be depraved."

Defendant in error is not under and subject to the Workmen's Com-

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pensation Act by virtue of its election to provide compensation to its employees under the act, but because it is engaged in an occupation declared to be extrahazardous by section 3 of the statute. Paragraph 2 of section 5 of the Workmen's Compensation Act provides that "minors who are legally permitted to work under the laws of the state" shall be considered the same and have the same rights as adults. It is immaterial to a decision of this case whether plaintiff in error is right or wrong in his contention that prior to 1917 the prohibition of sections 20c and 20j of the Child Labor Act did not apply to the occupation and business of defendant in error. It was declared by legislative enactment to be an extrahazardous business. Workmen's Compensation Act, § 3. By section 6 of the Child Labor Act, above quoted, it is made illegal to employ a child under 16 years of age in any such employment. If plaintiff in error was an employee of defendent in error, his employment was illegal, and the Workmen's Compensation Act does not apply to minors who are illegally employed. Roszek v. Bauerle & Stark Co., 282 Ill. 557, 118 N. E. 991, L. R. A. 1918F, 207; Messmer v. Industrial Board, 282 Ill. 562, 118 N. E. 993. As in our view this is a complete bar to an award under the Workmen's Compensation Act in favor of plaintiff in error, it is unnecessary to decide the other questions raised and discussed in the briefs.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

PAUL

v.

INDUSTRIAL COMMISSION ET AL. (No. 12666.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—JURISDICTION OF COMMISSION—REVIEW.

Though the sufficiency of evidence before the Industrial Commission is not subject to review where there is any evidence to establish its findings, questions of the commission's jurisdiction are an exception, and the evidence certified in the record may be reviewed and weighed to determine whether or not the commission has jurisdiction to apply the Compensation Act in any given case.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION—QUESTION OF FACT.

Whether or not an employer has elected to operate under the Compensation Act is a question of fact.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION TO COME UNDER.

Where an employer, on receipt of demand from the Industrial Commission that he comply with Workmen's Compensation Act, § 26, satisfied

*Decision rendered, June 18, 1919. 123 N. E. Rep. 541.

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the commission of such compliance, and received its certificate to such effect, which action on his part he explains as having been the result of his determination to operate under the act, he cannot be heard to say that he has not elected to come under the act merely because he has not filed formal notice of election with the commission.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DETERMINATION OF PERSONS ENTITLED.

Though there is no contest between the respective dependent relatives of the deceased employee as to the dependents entitled to payment of award, where there is no voluntary payment on the part of the employer and the Industrial Commission must determine the compensation, it is the duty of the commission to determine the person or persons entitled to the compensation.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Circuit Court, Christian County; J. C. McBride, Judge.

Proceedings for compensation under the Workmen's Compensation Act, by Charles A. Simpson, administrator, for the death of Carl A. Simpson, the employee, opposed by G. A. Paul, the employer. Compensation was awarded by the Industrial Commission, the award was affirmed by the circuit court on certiorari, and the employer brings error. Reversed and remanded, with directions.

John J. Priestley, of Chicago, for plaintiff in error.

J. E. Hogan and Arthur Roe, of Vandalia, for defendant in error.

STONE, J. The circuit court of Christian county affirmed the award of the Industrial Commission of Illinois in favor of the defendant in error. Charles A. Simpson, administrator of the estate of Carl A. Simpson, deceased, for injuries received by the deceased while in the employment of plaintiff in error. The administrator filed his application for adjustment of claim with the Industrial Commission on behalf of the estate, claiming dependency of himself as father of the deceased, and partial dependency of Alice M. Simpson, mother, and James D. Simpson and Ruth Simpson, brother and sister of the deceased. Upon hearing before the arbitrator duly appointed by the commission an award was entered in favor of the applicant. Upon hearing on review before the commission this award was confirmed. The cause was brought before said circuit on certiorari, as required by the statute, and upon hearing the finding of the commission was affirmed. The circuit court having entered a certificate that the issues herein were proper to be reviewed by this court, the cause is brought here by writ of error.

It is contended by the plaintiff in error that his business does not automatically come under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i), and that he did not elect to provide compensation according to the provisions of the act by filing notice of such election, as required by the statute; that the deceased did not leave any parent, grandparent, or grandchild who at the time of the accident in question was dependent upon his earnings, as provided in paragraph (c) of section 7 of the act; that the Industrial Commission erred in not making a finding as to the dependents entitled to receive compensation and the relative dependency of such dependents.

Plaintiff in error is engaged in the hardware, sheet metal work, and plumbing business, and said business is conducted in one building and from one office. The employees work wherever they are assigned, and their duties are not restricted to any one part of said business.

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The deceased was employed generally in the different departments of said business. On July 24, 1917, he was killed by a machine which fell upon him while he was assisting at loading it onto a wagon. This machine is known as a cornice break and weighed about one ton.

[1-3] Plaintiff in error's testimony before the arbitrator on the hearing in this cause was to the effect that he had received notice from the Industrial Commission to make provision for accidents or injuries occurring in connection with the operation of his business under said act; that he had complied with said notice by taking out indemnity insurance under the act, and had a certificate from the commission that he had fully complied with all the requirements of said act. This certificate of the Industrial Commission was offered in evidence, and is in the following language:

"You are hereby notified that the Industrial Commission has approved your compliance with section 26 of the Workmen's Compensation Act upon proof of same in accordance with the provisions of said act, upon the 16th day of July, 1917."

The plaintiff in error also stated to the arbitrator on the hearing, in answer to the question, "In other words, you concluded to work under the Workmen's Compensation Act?" "Yes, and I received a certificate from them." This is presumptive evidence of the filing of the notice of election as required by law.

Section 26 of said act provides that an employer who comes under section 3 of the act, or who elects to provide and pay compensation provided for in the act, "shall, within ten days of receipt by the employer of a written demand by the Industrial Board, (1) file with the board a sworn statement showing his financial ability to pay the compensation provided for in this act, normally required to be paid; or (2) furnish security, indemnity, or a bond guaranteeing the payment of the employer of the compensation provided for in this act normally required to be paid; or (3) insure to a reasonable amount his normal liability to pay such compensation in some corporation, association or organization authorized, licensed or permitted to do such insurance business in this state.

While, under the general rule, the sufficiency of evidence before the Industrial Commission is not subject to review where there is any evidence tending to establish the findings of the commission, yet questions of the commission's jurisdiction are an exception to this rule. The evidence certified in the record may be reviewed and weighed to determine whether or not the commission has jurisdiction to apply the act in any given case. Thede Bros. v. Industrial Com., 285 Ill. 483, 121 N. E. 172; Hahnemann Hospital v. Industrial Board, 282 Ill. 316, 118 N. E. 767. Paragraph (a) of section 1 of the act provides the method by which the employer shall give notice of such an election, as follows:

"Election by any employer to provide and pay compensation according to the provisions of this act shall be made by the employer filing notice of such election with the Industrial Board."

However, whether or not an employer elects to operate under the act is a question of fact. Paragraph (a) requires that notice of such election shall be filed with the commission but does not prescribe a particular form of notice to be used, and where the employer, as in this case, upon the receipt of a demand that he comply with section 26, satisfies the commission of such compliance and receives its certificate to that effect, which action on his part he explains as having been the result of his determination to operate under the act, he cannot be heard to say that he had not elected to come under the act merely because he had not filed formal notice of such election with the commission. The Industrial Commission had jurisdiction in this case.

The plaintiff in error having elected to come under the Workmen's

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Compensation Act, it is not material to discuss whether or not his business brought him automatically under said act.

The arbitrator found from the evidence that the deceased left him surviving his father, mother, brother, and sister; that the father was not able to earn sufficient compensation to support himself and family; that the sister was a minor and the brother was in ill health; that the entire earnings of the deceased was paid to the mother, to be applied to the necessary support and living expenses of the entire family; that the other brother worked a portion of the time, and likewise turned over his earnings to the mother for the same purpose; that the mother had no money in the bank; that all, or substantially all, of the earnings of the deceased was expended in the support of the family, along with other moneys given to the mother by the father and the other brother; that the deceased was 16 years old at the time of the injury resulting in death; that the injury arose out of and in the course of his employment with the plaintiff in error. The arbitrator gave the minimum award, payable in 275 weeks at $6 per week, provided in paragraph (c) of section 7 of the act. On a hearing on review the award of the arbitrator was confirmed and declared to be the decision of the commission. There was competent evidence in the record upon which to base such finding.

[4] The award was allowed to the administrator. The Industrial Commission in allowing the award did not determine which of the foregoing relatives were dependent upon the deceased employee. While there is no contest between the respective relatives as to the dependents entitled to the payment of the award, nevertheless where there is no voluntary payment on the part of the employer and the Industrial Commission must determine the compensation, it is the duty of the commission to determine the person or persons entitled to the compensation. Smith-Lohr Coal Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231.

The judgment of the circuit court will be reversed, and the cause remanded to that court, with directions to remand the same to the Industrial Commission for further proceedings consistent with the views herein set forth.

Reversed and remanded, with directions.

SUPREME COURT OF IOWA.

AMERICAN BRIDGE CO.

v.

FUNK, Industrial Commissioner et al. (No. 32497.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —JURISDICTION—REVIEW ON CERTIORARI.

In a proceeding under the Workmen's Compensation Act, an affirmative finding by the industrial commissioner as to the existence of the relation of employer and employee, and as to whether the injuries arose out of and in the course of the employment, erroneous only, because against the greater weight or preponderance of the evidence, will not be set aside in certiorari proceedings as being in excess of jurisdiction.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

*Decision rendered, July 7, 1919. 173 N. W. Rep. 119.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —RELATION OF EMPLOYER AND EMPLOYEE—EVIDENCE —SUFFICIENCY.

In a proceeding under the Workmen's Compensation Act, a finding that decedent, although he had left the premises under orders of his foreman and returned on a personal mission, was still an employee when killed, *held* not against the undisputed evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

Certiorari to test the jurisdiction of the industrial commissioner to award compensation to an employee for injuries claimed to have been received by him in the course of his employment. The finding and award of the commissioner was sustained by the court below, and defendant appeals. Affirmed.

Tinley, Mitchell, Pryor & Ross, of Council Bluffs, and Morsman, Maxwell & Crossman, of Omaha, for appellant.

Mayne & Green, of Council Bluffs, for appellees.

STEVENS, J. One Pettit, on and prior to the date on which he was fatally injured, was employed by the American Bridge Company as an assistant, or carpenter's helper, on a new bridge which appellant was erecting for the Union Pacific Railway Company across the Missouri river between Council Bluffs and Omaha. Shortly after he arrived on the premises on the morning of November 4, 1916, to go to work, he was struck and run over by a railway train and instantly killed. His beneficiary made claim against appellant, under the Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), and it was found by the committee of arbitration, before which a hearing was had upon evidence introduced on both sides, that claimant was entitled to compensation at the rate of $9.23 per week for a period of 300 weeks. The finding and award of the arbitration committee was affirmed, upon review, by the industrial commissioner, and appellant sued a writ of certiorari out of the district court of Pottawattamie county, alleging in its petition and a subsequent amendment thereto, among other matters: (a) That the proximate cause of Pettit's injuries was his voluntary intoxication, and (b) that the injury did not arise out of or in the course of his employment, and that same were inflicted after he had been discharged for the day and had left the premises and returned therefo upon a personal mission, and therefore the industrial commissioner acted illegally and without jurisdiction in affirming the finding and award of the arbitration committee. No claim was made in the court below that certiorari was not the proper remedy, and, in view of the conclusion reached upon the jurisdictional question presented, we refrain from discussing or passing upon the question of procedure now urged for the first time in this court.

But a single question reviewable upon this appeal is presented for decision, namely: Was the finding and order of the industrial commissioner illegal and in excess of his proper jurisdiction? The jurisdiction and authority of the industrial commissioner to award compensation to an injured employee is, by the statute creating this tribunal, limited to claims for injuries received by an employee in the course of and growing out of his employment.

[1] The contention of counsel for appellant is that the evidence upon which the finding and award of the arbitration committee, and the order of the commissioner affirming same, is based, shows conclusively, without conflict or dispute, that Pettit had been discharged

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by appellant, and that he had left the premises in obedience thereto, before the injury resulting in his death was received by him, and that same occurred after he had returned to the premises upon a personal mission, and consequently did not arise out of and in the course of his employment. The relation of employer and employee admittedly existed between the parties on the morning of the accident and up to within a few minutes of the time when Pettit was killed. The commissioner manifestly had jurisdiction of the subject-matter and of the parties, and also to determine from the evidence whether the relation of employer and employee existed between them, and also whether the injuries for which compensation was sought arose out of and in the course of the employment. An affirmative finding by the commissioner upon these questions of fact, erroneous only, if at all, because against the greater weight or preponderance of the evidence, clearly could not be set aside, in certiorari proceedings upon the ground that same was illegal or in excess of his jurisdiction. Whether, in any case, a finding by the commissioner upon the evidence before him that the relation of employer and employee existed, and that the injury grew out of and in the course of the employment, could properly be set aside in certiorari proceedings, we need not decide, as we reach the conclusion that the finding and award of the commissioner is not against the undisputed evidence upon which same was based

[2] "Jurisdiction" is the power to hear and determine questions of law and fact, and, as was said by the Supreme Court of California in Armantage v Superior Ct. 1 Cal. App. 130, 81 Pac. 1033, confers the power to decide wrong as well as right.

The jurisdiction conferred by the statutes of this state upon the industrial commissioner is limited to "matters relating to employer's liability for personal injury sustained by employees, fixing compensation therefor, securing payment thereof," etc. But his authority in matters coming within his jurisdiction necessarily involves the right to decide all questions properly arising out of the controversy before him.

The commissioner may well have found from the evidence offered upon the question of Pettit's intoxication that he had been drinking and was to some extent under the influence of liquor, but that same was not the proximate cause of his injury.

[3] The commissioner found upon the other questions of fact that Pettit was slightly deaf, that the evidence failed to show affirmatively that he heard the foreman, when he first spoke to him upon the subject, tell him he had better go home and stay until Monday morning and sober up, and that he did not realize or understand, before he left the bridge with Morgan, whose hand had been badly bruised by a heavy block of wood carelessly dropped by Pettit, or until after his return, that he was discharged for the day. This finding has some support in the evidence; whether by the greater weight thereof is a question we cannot determine in this proceeding. The evidence is undisputed that Morgan, a fellow employee, with whom Pettit worked as an assistant or helper, told him when he began work that "he was not fit to work" and that Pettit replied, "Morgan, I am all right," and went to work; that Beabers, an assistant foreman, observing that Pettit had dropped a block bruising Morgan's finger, asked the latter why "he did not send Pettit in if he thought he was not fit to work"; and that the foreman told Pettit that he had better go home and stay until Monday morning; but it does not appear that the latter made any response to this statement. He left the premises with Morgan, who went a short distance from the bridge to have his fingers dressed, and returned with him and attempted to resume work. The foreman, however, seeing him pick up one of the heavy blocks of wood which he had been carrying earlier in the morning, peremptorily ordered him "to go home and sober up." Pettit commenced work on the morning in question about 8 o'clock and was killed something like a half hour later It is the claim of counsel for

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appellant that, when he left the bridge in company with Morgan, it was in obedience to the order of the foreman discharging him for the day. and that he returned to inquire whether he was finally discharged, and that therefore his injuries were received after his employment had terminated and after he had not only been allowed a reasonable time in which to leave, but after he had in fact left the premises. The record does not show conclusively that deceased left the premises with Morgan because he had been discharged, or that he may not have gone with Morgan on account of his injuries. It may be that the finding of the commissioner is not supported by the greater weight or preponderance of the evidence; but we cannot say, upon the record before us, that it is against the undisputed evidence, and proper inferences to be drawn therefrom.

It is our conclusion, therefore, that the commissioner did not act illegally or without jurisdiction in affirming the award of the arbitration committee, and that no ground for reversal exists. The finding and judgment of the court below is therefore affirmed.

Affirmed.

Ladd, C. J., and Gaynor and Weaver, JJ., concur.

SUPREME COURT OF IOWA.

BEDARD

v.

SWEINHART. (No. 32549.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"CASUAL EMPLOYEE."

Where plaintiff, after finishing a job of shingling a house, and while engaged on a job for another employer, reported to his first employer that the chimney needed a little cement, whcih he would put on for nothing if his employer would get cement, and was injured in coming down from his work, he was a "casual employee" within the exception of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from District Court, Woodbury County; George Jepson, Judge.

Action for damages by an employee against his employer for personal injuries sustained in the course of his employment. At the close of the evidence there was a directed verdict for the defendant. The plaintiff appeals. Affirmed.

Sears & Snyder, of Sioux City, for appellant.

Fred W. Lohr and Henderson, Fribourg & Hatfield, all of Sioux City, for appellee.

*Decision rendered July 2, 1919. 172 N. W. Rep. 937.

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EVANS, J. The plaintiff as appellant concedes that his own negligence contributed materially to the injury complained of. In order to avoid the effect of his contributory negligence, he pleaded that his employment was within the provisions of the Workmen's Compensation Act (Acts 1913, c. 147), and that his employer had failed to comply with the requirements thereof, and that he had thereby waived the contributory negligence of the plaintiff. The one question in the case is whether the plaintiff's employment came within the provisions of the Workmen's Compensation Act, or whether he was a "casual employee" only within the meaning of the exception to such act.

It is conceded that the provisions of this act do not apply to a "casual employee"; that is, to one whose employment is of a casual nature. The salient facts involved are that the defendant was engaged in the real estate business and maintained an office. As a part of his business, he looked after the renting of property for others and of collecting the rent therefor and of keeping the same in reasonable repair. He employed the plaintiff to make some repairs in the way of shingling on the house of one of his patrons. While the plaintiff was engaged upon that job, the defendant requested him to fix a screen door and a cellar window at another place at an expense of 50 cents. The plaintiff was under considerable physical disability and was not able to work but a few hours at a time. The agreement as to his compensation for the shingling was that he was to receive $2 for each thousand shingles laid. Under this agreement he did $5 worth of work in four days, which practically finished his employment. It appears, however, that he had discovered that a little cement was needed at the base of the chimney on the roof which he had been shingling which fact he reported to his employer. He proposed that his employer get the cement for him and he would put it on for nothing. He was at that time already at work upon another job for another man. When he received the cement from defendant, he left the other job temporarily and made the repair upon the defendant's chimney. In coming down from his work he received his injury. He testified also that in the course of his conversation with the defendant it was agreed that he would work for the defendant at other jobs as they might arise for 40 cents an hour. It is not claimed that there was any particular job in sight or that the conversation had reference to any particular job.

The trial court held that the plaintiff was a "casual employee" within the exception to the Workmen's Compensation Act. We think the holding was clearly right. If this was not a "casual employment," it would be hard to apply the term to any employment. The word "casual" is defined in the dictionaries as "coming without regularity; occasional; incidental;" "coming at uncertain times or without regularity in distinction from stated or regular;" "a laborer or an artisan employed only irregularly." See Webster and Century Dictionaries. We do not find the authorities cited by the appellant as being applicable to the facts disclosed by this record. The following authorities supported the holding of the trial court: Blood v. State Industrial Commission, 30 Cal. App. 274, 157 Pac. 1140; Hill v. Begg, 2 K. B. 802; Bargewell v. Daniel, 98 L. T. N. S. 257; Toombs v. Bomford, 106 L. T. N. S. 823.

The judgment below is, accordingly, affirmed.

Ladd, C. J., and Preston and Salinger, JJ., concur.

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SUPREME COURT OF IOWA.

JAMES BLACK DRY GOODS CO. ET AL.

v.

IOWA INDUSTRIAL COM'R ET AL. (No. 32245.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW.

Under Code Supp. 1913, § 2477m33, decision of the commissioner of arbitration committee on the fact in controversy is reviewable in district court by certiorari, though jurisdictional question is not involved.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DEPENDENCY OF SURVIVING SPOUSE—"DESERTION."

To constitute "desertion," within Code Supp. 1913, § 2477m16 (c) (1), creating conclusive presumption that surviving spouse is wholly dependent upon deceased employee unless she willfully deserted him, there must be cessation of marriage relation, intent to desert, and absence of consent or misconduct of party alleged to have been deserted.

(For other cases, see Master and Servant, Dec. Dig. §388.)

(For other definitions, see Words and Phrases, First and Second Series, Desertion.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DESERTION OF WIFE—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show that wife, claiming compensation for death of husband, had deserted him, within Code Supp. 1913, § 2477m16 (c) (1).

(For other cases, see Master and Servant, Dec. Dic. § 405[5].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —RIGHT TO COMPENSATION—DESERTION.

Where husband is unable to support his wife, her separation from him with his consent, for purpose of earning wages to support herself and children, does not constitute desertion within Code Supp. 1913, § 2477m16 (c) (1), creating conclusive presumption that surviving spouse of deceased employee is wholly dependent upon deceased, unless it be shown that she willfully deserted him.

(For other cases, see Master and Servant, Dec. Dig. §388.)

Appeal from District Court, Black Hawk County; H. B. Boies, Judge.

Appeal from a judgment in certiorari proceedings. This case was originally tried before the arbitration committee, which found for appellee Norma Wright. Thereafter the cause was reviewed by the district court, upon application of plaintiffs, appellants, which court confirmed said finding. The plaintiffs appeal. Affirmed.

Williams & Clark, of Waterloo, for appellants.
Reed, Tuthill & Reed, of Waterloo, for appellees.

*Decision rendered, July 2, 1919. 173 N. W. Rep. 23.

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PRESTON, J. Appellees filed their petition in the district court for the writ of certiorari on October 4, 1916. Four or five errors are assigned, some of which relate to the admission of evidence and the like before the arbitration committee and the commissioner, and that the trial court erred in holding, under the evidence, that there was no desertion. The principal point in the case, and indeed it was conceded by appellants, at the oral argument on submission, that the only question in the case, was whether or not the appellee Norma Wright had deserted her husband prior to his injury and death, and for that reason would not be entitled to compensation.

[1] Appellees contend in this court that certiorari is not the proper method of reviewing the decision of commissioner and arbitration committee, because no jurisdictional question is involved; second, that this court does not enter into a fact of controversy in such cases; and, third. the facts show that appellee Norma Wright did not desert her husband Appellee's husband, George E. Wright, was struck by an interurban car, and killed, on June 1, 1915, at Waterloo, Iowa. He was an employee of the appellant dry goods company. The other appellant is the insurer of the dry goods company. It was admitted that the injury arose out of the employment of deceased by the dry goods company. For rule as to what questions will be considered in such a case, see Des Moines Union Ry. Co. v. Funk, 164 N. W. 648; Griffith v. Cole Bros., 165 N. W. 577-580, L. R. A. 1918F, 923; Goeppinger v. Board of Supervisors, 172 Iowa, 30, 152 N. W. 58; Code Supplement, § 2477m33. Other cases might be cited, perhaps, but the rule seems to be settled.

Code Supplement, § 2477m16 (c) (1), provides that the surviving spouse shall be conclusively presumed to be wholly dependent upon a deceased employee "unless it be shown that the survivor willfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as dependent in any degree. No surviving spouse shall be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury." Appellants' contention is that the undisputed evidence shows that the appellee Norma Wright had deserted her husband, and that therefore the allowance to her of compensation, as the widow of deceased, was illegal. It seems to be conceded that in such a proceeding we do not pass upon questions of fact, and that if the committee and the commissioner could have found, under the evidence, even though there was a conflict therein, that said appellee had not deserted her husband, then there is no question for this court to pass upon.

[2] The cases cited by both parties on the question of desertion are divorce cases, and the same cases, substantially, are relied on by both. In divorce cases, the rule seems to be that there are four elements necessary to constitute desertion: First, the cessation of the marriage relations; second, the intent to desert; third, a continuance of the desertion during the statutory period; fourth, the absence of consent or misconduct of the deserted party. The divorce cases may not be precisely analogous. The divorce statute provides for desertion for a specified time, which is not the case in the statute as to compensation. Otherwise, we think there is but little, if any, difference. It is true in the instant case it is a question of dependence and compensation, rather than a dissolution of marital relations. Under the statute, the dependence is presumed unless there is desertion, where the marriage relation between husband and wife is involved. Both statutes involve the element of willfulness. We think all other elements—that is, the cessation of the marriage relations, the intent to desert, and the absence of consent of misconduct of the party alleged to have been deserted—are necessary to constitute desertion under the compensation statute. Under this rule, we shall refer to the evidence as briefly as may be, particularly the evidence on behalf of appellee Norma

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Wright, to sustain her claim, and the finding of the commissioner that there was no desertion. There is really but little dispute in the evidence. It is more a question of what conclusion should be drawn therefrom, and whether the committee and commissioner were justified in making their finding.

[3] Appellants contend that appellee deserted her husband in 1909, at the time she left Waterloo. It appears that appellee Norma Wright and George E. Wright were married in Vermont in 1883, and lived together until 1902, when he left because of some serious financial difficulty. From 1902 until the time of his death, he changed locations frequently, being in Little Rock, Ark., New Mexico, Memphis, Tenn., Chicago, Omaha, and Muscatine. He also had several positions at Waterloo, Iowa. Soon after he left, in 1902, he wrote appellee from Little Rock, saying in part:

"My Dearest Little Sweetheart: And you want to be my little wife always, and I want you to be my dear little wife always. I promise before God never again to give you cause to regret any action of mine. I am living uprightly, and will die before I ever again do any wrong. * * * I hope you will fully believe me, my darling, for it is the truth. * * * Oh, I have suffered so much, and now that I am enabled to see and understand everything, my sinfulness seems awful. My darling, I shall strive hard to get enough to pay up everything, and clear up everything with the world, and I can meet those I owe, and you can all feel your George is worthy of a place among men."

Between the year 1902 and the time of his death, deceased visited his family twice, at Staten Island, once in 1906, and again in 1907. Each time he remained a couple of months, and then came West. About 1909 appellee and her 15 year old son visited deceased in Waterloo, and they lived together for about two months. It is shown that they lived in one room and boarded out. Some of the witnesses say there were two rooms, but at any rate it was not a home. Appellee worked part of the time to help support them. She says her husband did not show a willingness to provide a home for her in Waterloo, because he did not provide it; that he did not have financial means; he had a great many things to pay up. During these two months, deceased tried to find employment for his son at Waterloo. There was another son in the East. Appellee says she left Waterloo on account of financial affairs and stress, and the placing of her son at work. They returned to Staten Island, and the son took a position in a bank, which he has held ever since. There was a quarrel or disagreement between them, during the time they were living together at Waterloo; but they made up, and before she left they talked over the plans for a future home. She said they had hoped that some time they could have a home, and that her husband said he hoped some time they would have a home, where the children can come, and where they could all be together. They parted good friends, and the evidence does not indicate that they gave up this hope of some day having a home together. The evidence is that appellee left Waterloo with the consent and approval of her husband; that, when she told him that she was going, he said it would be all right, until they could get financially better fixed; that he thought he could get a better start. The letters thereafter corroborated this. Within a month of the time she left Waterloo, she received $20 from him. Deceased sent her money at other times. In 1912 appellee wrote her husband:

"My Dearest George: I wish to thank you very much for sending me the money. I am awfully happy when I get it, because I realize you are thinking of me. Some time you and I are going to be very happy. I just know it. Now, George, dear, write me often, and all the news. With lots of love. Norma."

This letter was written after the alleged desertion. The record

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shows a number of other letters and postal cards between the two. There are a number of registered packages, which she says were letters containing money. It seems that appellee worked in hotels in the South in the winter, and in the East in the summer time. In February, 1915, a few months before her husband was killed, and while she was second housekeeper at a hotel in Palm Beach, Fla., she wrote her husband in part:

"That is a nice hotel you were in. I have been in so many I hate them, but I have made a success of my work, and it gives me a living. I am always hoping to have a little home somewhere, and perhaps before we die we shall. Write me whenever you can. I often think of our happy times, and the lovely times you used to give me, and regret our years of loneliness, for we both have missed so much that would have made life worth living. Hoping to receive a long letter from you, and with love and best wishes. Norma."

In March, 1915, deceased wrote his son an affectionate letter, saying that he is looking for a letter from the boy's mother, and presumes she will be back in New York soon. Again, in March, 1915, he wrote this son, saying that he might visit them the next summer, and inclosed a note to his wife. There is evidence on behalf of appellants by people who were acquainted with deceased, and who met appellee when she was at Waterloo, and their thought is that appellee was not cordial toward her husband, and that she did not seem to care for housework, and there is evidence by some of these witnesses as to statements made by deceased in regard to her going.

[4] We are of opinion that the evidence falls far short of showing desertion on the part of appellee. The mere fact that they did not live together is not enough. We have held that separation and desertion are not synonymous, in Kupka v. Kupka, 132 Iowa, 191-193, 109 N. W. 610, and approved in Tipton v. Tipton, 169 Iowa, 182-185, 151 N. W. 90, Ann. Cas. 1916C, 360. We have said in a divorce case that the act is willful when there is a design to forsake the other spouse willfully or without cause, and thereby break up the marital union, deliberate intent to cease living with the other as spouse, abnegation of all duties of the marriage relations, the actual ceasing of cohabitation, and the intent to desert. In Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. Rep. 708, it was said that separation, no matter how long continued, unless there was an intent not to return, or, in other words, an intent to abandon, would not constitute grounds for divorce. In Day v. Day, 84 Iowa, 221-226, 50 N. W. 979, it was said that, if plaintiff consented to defendant living apart from him, there was no desertion. The thought of some of the cases seems to be that there must be a refusal.

Appellant cites Massachusetts and Michigan cases, holding that the claimant for compensation must show that she and her husband were living together at the time of his death, and that her living apart from him was not for justifiable cause, if he was earning enough to support her properly. But appellants concede that the statutes are not analogous to the Iowa statute, because of provisions in the states requiring that they shall be living together, etc. As to one feature, or reason, for appellee living apart from her husband and earning money, we think it would not do to hold that, if a husband is not able to pay his debts and support his wife, she may not, with her husband's consent, earn wages to help support herself and her children, without being charged with desertion. Without further discussion, we think the committee and the commissioner were justified in finding, under the evidence, that appellee had not willfully deserted her husband, and that the trial court properly so held, under the record presented to him. The judgment is affirmed.

Affirmed.

Ladd, C. J., and Evans and Salinger, JJ., concur.

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SUPREME COURT OF KANSAS.

MISCHLICH

v.

MORRIS & CO. (No. 22029.)*

MASTER AND SERVANT—DENIAL OF NEW TRIAL—DISCRETION OF TRIAL COURT.

In a workmen's compensation case, a physician and surgeon testified for defendant that he had examined the plaintiff's injury, and that the alleged stiffness of the ankle was accounted for by keeping the ankle bandaged and failing to exercise it. At the defendant's request, the plaintiff was called and removed his shoe and stocking. The physician examined it in the presence of the jury, and testified that, if plaintiff would relax the muscle, there was normal movement, but that plaintiff was holding his ankle rigid by his own will. Thereupon plaintiff's counsel asked the jurors to come and examine plaintiff's ankle and see whether or not it was stiff. Over the defendant's objections, two of the jurors came and personally examined the ankle. The court refused the defendant's request that the jury be discharged. *Held,* that question whether, under all the circumstances, the jury should have been discharged was in the sound discretion of the court; that there was no abuse of discretion in refusing the request, and no error in denying a new trial.

(For other cases, see Master and Servant, Dec. Dig. § 411½, New, vol. 5A Key-No. Series.)

Dawson and Marshall, JJ., dissenting.

Appeal from District Court, Wyandotte County.

Action by Wesley Mischlich against Morris & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Keplinger & Trickett, of Kansas City, for appellant.
David F. Carson, of Kansas City, for appellee.

PORTER, J. In an action for workmen's compensation, plaintiff recovered judgment, and the defendant appeals.

The plaintiff claimed that on the 10th day of October, 1915, while in the employ of the defendant at its packing house, he sustained an injury to his ankle which produced a stiffening and hardening of the bone, described as ankylosis; that the injury resulted in the loss of the use of the ankle and part of the leg; and that the condition is permanent. He testified that, while working at night in charge of a cold storage room, he stepped upon a loose board which broke, causing him to fall and spraining his foot and ankle; that he did not return to work for three weeks, when he worked two or three nights, but was unable to continue, and that he was discharged by the foreman; that it was a year and three months before he was able to do any work.

The defendant sought to show that, if plaintiff suffered any accident, he sustained only a trifling injury, and that the condition of his ankle was caused by keeping it constantly bandaged and by the failure to use it. The defendant also contended that the plaintiff first claimed he was injured on October 24th, and that he was absent from work not to exceed

*Decision rendered, June 7, 1919. 181 P. Rep. 619. Syllabus by the Court.

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eleven days, and was discharged for refusing to obey orders. One of the witnesses for the defendant was its general timekeeper, who produced the pay rolls of the plant for the last six months of the year 1915, and which showed that the plaintiff received his regular wages from October 10th to October 24th, and that he worked from November 4th until December 2d, when he was discharged. The timekeeper testified that when a man reports for work he calls at the time office and is given a check; that after he has completed his work he drops the check in the same window where he received it in the morning and gets credit on the pay roll for the work he has performed. The defendant offered the evidence of several of the plaintiff's neighbors and acquaintances to impeach his reputation for veracity, and the plaintiff offered rebuttal testimony to sustain his reputation in this respect.

The jury returned a verdict for plaintiff allowing him $990 compensation, and found that the plaintiff performed no work from October 10th to October 24th, and that he did not go to work on November 4th, and continue to work until December 2d.

The defendant contends that the verdict was given under bias and prejudice, and that this is evident from the findings, which, it is insisted, are contrary to the overwhelming evidence, including that of the books and records of the timekeeper. The point is urged, however, as a basis for the defendant's principal contention, which is that the court committed error in refusing to discharge the jury because of an incident which occurred during the progress of the trial. The matter arose in this way: A physician and surgeon who had made an examination of plaintiff's ankle about eight months after the alleged injury was called by the defendant as a witness. He testified that when he first examined the plaintiff he found the ankle tightly bandaged, and the plaintiff walking with a cane; that he advised him to remove the bandage and to lay aside the cane and to use his ankle; that otherwise he might have a stiff ankle; that he found no lost motion in the joint, but, in his opinion, keeping the ankle bandaged and walking with a cane accounted for the condition at that time, and also at the time of the trial in 1918. He testified, too, that at the first examination the plaintiff persisted in holding the ankle rigid, but that, upon distracting plaintiff's attention, he was able to move the joint freely, and that the reflex was practically perfect. During the examination of the physician as a witness plaintiff, at the defendant's request, removed his shoe and stocking, and the physician proceeded to explain to the jury the condition of the ankle, and testified that, if plaintiff would relax and let go of the tendon and muscle, there was normal movement; that plaintiff was again holding his ankle rigid by his own will, so that it was almost impossible to move it; but that in the opinion of the witness there was no rigidity due to any injury. Thereupon counsel for plaintiff asked the jurors to leave the jury box and personally feel and examine plaintiff's ankle and see whether or not it was stiff, and at his urgent solicitation two of the jurors came forward and personally examined plaintiff's foot. Counsel for defendant objected, and stated that he did not consider the practice proper, because some jurors would have, evidence which others would not have, except by hearsay in the jury room. The court refused to make a ruling upon the objection, and the defendant asked that the jury be discharged and supported the motion by an affidavit reciting the foregoing facts.

The motion to discharge the jury was overruled, and it is claimed that the court erred in this, and also in denying the motion for a new trial. The defendant contends that the situation was the same as where one or more members of the jury have visited the locality or scene of an accident, and subsequently have discussed or argued in the jury room facts discovered by them under such circumstances. The case of Ortman v. Union Pacific Ry. Co., 32 Kan. 419, 4 Pac. 858, and cases cited in the opinion, are relied upon in support of the defendant's contention. In

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that case it was held that the personal examination of the premises where an accident occurred and the knowledge thereby acquired by certain members of the jury doubtless influenced them in arriving at their verdict, and may have controlled other jurors, and for this reason it was held that the verdict should have been set aside and a new trial ordered. In view of the fact that the incident complained of in this case occurred in the presence of the judge of the district court, the majority take the view that the question whether the jury should have been discharged was one which rested under all the circumstances in the sound discretion of the trial court, and that it cannot be said that the court abused its discretion in refusing to discharge the jury, or that it was error to refuse a new trial.

The judgment is affirmed.

Johnston, C. J., and Burch, Mason, and West, JJ., concur.

DAWSON, J. (dissenting). I think the fact that two of the jurors left the box and personally inspected the plaintiff's alleged injuries was improper and, I fear, prejudicial; and I am quite sure that the conduct of counsel was prejudicial, and so reprehensible that it ought to cause a reversal of the judgment, since there seems to be no other way to stop such misconduct.

In Tidball v. Railway Co., 97 Kan. 396, 399, 155 Pac. 938, 939, Mr. Justice Porter condemned such unseemly behavior. He there said:

"Several times in the course of the trial the court was requested to rule upon objections made to the conduct and statements of plaintiff's counsel in the presence of the jury. I think some of these objections should have been sustained, and that the defendant was prejudiced by the refusal of the court to rule one way or the other. At different stages of the trial the court would have been justified, I think, in discharging the jury and continuing the case. Some of the proceedings bear little resemblance to an orderly trial in a court of record, and I think a new trial should be ordered."

Marshall, J., concurs in this dissent.

SUPREME COURT OF KANSAS.

VILLALOBOS

v.

CUDAHY PACKING CO. (No. 22204.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD OF EMPLOYER'S COMPENSATION COMMITTEE—REVIEW.

A workman for a packing company was injured in the course of his employment. The compensation committee organized by the company proceeded to award compensation to the workman, who, although notified, did not attend, and refused to accept the award. Within a few weeks he brought an action to review and cancel the award and have his compensation fixed, alleging, among other things, that the award was grossly inade-

*Decision rendered, June 7, 1919. 181 Pac. Rep. 619. Syllabus by the Court.

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quate, and that his incapacity to work had increased since the award was made. It is *held* that under Gen. St. 1915, § 5923, as amended by section 16 of chapter 226 of the Laws of 1917, the court had jurisdiction and authority to review the award and to consider all competent evidence touching the inadequacy of compensation and increased disability.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—AWARD BY COMMITTEE OF EMPLOYING COMPANY—REVIEW—EVIDENCE.

The court determined that the committee had acted in good faith, but that the award was grossly inadequate, and rendered judgment for a lump sum to cover total and partial incapacity. The evidence examined, and *held* to support the judgment.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ALLOWANCE FOR MEDICAL EXPENSES—EVIDENCE.

The sum allowed for doctors' bills and hospital and medicine bills was supported by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from District Court, Sedgwick County.

Action by Preciliano Villalobos against the Cudahy Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Houston & Brooks, of Witchita, for appellant.

Dempster O. Potts and W. P. Campbell, both of Witchita, for appellee.

WEST, J. This was an action to review and cancel an award made under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942), and to recover compensation. The plaintiff prevailed, and the defendant appeals.

The plaintiff was injured by falling so that his side struck the edge of a barrel. Being a Mexican, his interpreter took up the matter of adjustment with the counsel for the employer, but owing to latter's other engagements, no definite meeting was had. In the meantime, the compensation committee, organized by the defendant company, took up the matter, and, having notified the plaintiff, who did not appear, adjourned the hearing to a subsequent date, and made an award, the plaintiff not appearing. Within a few weeks the plaintiff brought this action, asking for a review of the award, that it be canceled and held for naught, and that the court determine the issue and fix the compensation. He denied the authority of the committee, and alleged that he had been at all times ready and willing to settle by agreement; that he had a verbal agreement with defendant's counsel which was not carried out; that the committee acted under the influence of the defendant, and that the compensation was grossly inadequate; and that his incapacity to work had increased since the award was made and filed.

On hearing the entire matter, the court found that the compensation committee acted in good faith, but that the plaintiff had been totally disabled for five months, and that it would require three months more to recover, and for this, and nine months' partial disability, allowed him $772.80, and found that the award of the committee was legal and valid in all respects, but grossly inadequate.

[1, 2] The defendant urges two grounds for reversal: First, that the plaintiff could not ignore the arbitration proceedings and then

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set aside the award as grossly inadequate; and, second, that there was no evidence to sustain the judgment. As to the latter, several doctors testified and differed. One thought there was an enlarged spleen, another, that there was a broken rib. There was evidence of swelling and great soreness and it seems that the plaintiff was in bed for some time. Some deemed him neurasthenic. It is impossible to read the descriptions of his condition without regarding it as far from one of health. The court expressed the conviction that there was traumatism which had developed the plaintiff into a malingerer, a neurasthenic, and rendered judgment for a lump sum.

The original section (section 5923, Gen. Stat. 1915; Laws 1911, c. 218, § 29) reads:

"At any time within one year after an agreement or award has been so filed, a judge of a district court having jurisdiction may, upon the application of either party, cancel such agreement or award, upon such terms as may be just, if it be shown to his satisfaction that the workman has returned to work and is earning approximately the same or higher wages as or than he did before the accident, or that the agreement or award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct, or that the award is grossly inadequate or grossly excessive, or if the employee absents himself so that a reasonable examination of his condition cannot be made, or has departed beyond the boundaries of the United States or Canada."

This was amended by section 16, chapter 226, of the Laws of 1917, so as to read as follows:

"At any time before the final payment has been made under or pursuant to any award or modification thereof agreed upon by the parties, it may be reviewed by the judge of the district court having jurisdiction, upon the application of either party, and in connection with such review the court may appoint a physician or surgeon or two physicians or surgeons to examine the workman and report to the court, and the court shall hear all competent evidence offered, and if the court shall find that the award has been obtained by fraud or undue influence or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct or that the award is grossly excessive or grossly inadequate, or that the incapacity or disability of the workman has increased or diminished, the court may modify such award, upon such terms as may be just, by increasing or diminishing the compensation, subject to the limitations hereinbefore provided in this act; and, if the court shall find that the workman has returned to work for the same employer in whose employ he was injured or for another employer and is earning the same or higher wages than he did at the time of the accident or injury, or is gaining an income from any trade or employment which is equal to or greater than the wages he was earning at the time of the accident or injury, or shall find that the workman has absented himself and continues to absent himself so that a reasonable examination cannot be made of him by a physician or surgeon selected by the employer, or has departed beyond the boundaries of the United States or Dominion of Canada, the court may cancel the award and end the compensation; provided, that the provisions of this section shall not apply to awards of compensation provided for in the schedule of specific injuries in section 3 of this act."

Section 32 of the Act of 1911 (Gen. Stat. 1915, § 5926) has not been amended, and provides that an agreement or award may be modified at any time by a subsequent agreement.

"Or, at any time after one year from the date of filing, it may be reviewed, upon the application of either party on the ground that

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the incapacity of the workman has subsequently increased or diminished. Such application shall be made to the said district court; and, unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the workman and report to it; and upon his report and after hearing the evidence of the parties, the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided"

These things then may be considered by the court in reviewing an award: Fraud, undue influence, lack of authority, serious misconduct on the part of the committee or arbitrator, gross excess in amount, gross inadequacy, increase of disability, decrease of disability, subsequent receipt of wages equal to or exceeding those received when injured, absence of the workman so that a physical examination cannot be made. It is argued that gross inadequacy is to be judged by the evidence which was before the committee, and must be such as to imply bad faith when made. But certainly this cannot be true in case of increased or diminished disability, for such increase or decrease is what may render the award grossly excessive or grossly inadequate. There is no direction that competent evidence be received with reference to some of the points already suggested and not as to others, and the natural meaning of the language is that competent evidence touching any of such points is to be received. There seems to be very little uniformity in the workman's compensation statutes touching the matter of review and cancellations of awards. From a note, 6 N. C. C. A. 548, it appears that California provides for certiorari or review and the certification of the record in the case to the court on which record alone the cause shall be heard. Laws 1913, c. 176, § 84. Maryland (Laws 1914, c. 800, § 55) provides for a review in the nature of an appeal, and if the court shall determine that the commission has acted within its power granted by the act, this decision shall be confirmed, otherwise reversed or modified. By motion of either party questions of facts involved in such cases may be submitted to a jury. Oregon has a similar provision. Laws 1913, c. 112, § 32. West Virginia provides for an appeal to the Supreme Court. Laws 1913, c. 10, § 43.

The committee in this case made no findings of fact, and there seems to be no requirement that any be made. Hence all the court could act on was the award and such evidence as might be produced. Boyd's Workman's Compensation, § 569, quotes from Radcliff v. Pacific Steam Nav. Co., 3 B. W. C. C. 185:

"The doctrine of res judicata does not apply to a decision as to the amount of weekly payment to the injured workman when it is made the subject of an application to review, although it may apply to some of the facts proper to be considered on the occasion of such a review. The issue on such a review is the same issue as if it were an original award made at the date of the review, and the amount to be awarded is a payment which, in case of partial incapacity, must not exceed the difference between the amount of the average weekly earnings of a workman before the accident and the average weekly amount which he is earning, or able to earn, in some suitable employment or business at the date of the review, but is to bear such relation to the amount of such difference as may under the circumstances of the case appear proper."

See, also, note L. R. A. 1916A, 266.

When, as in this case, no findings are made and no evidence returned with the award, how can the court "find that * * * the award is grossly excessive or grossly inadequate, or that the disability of the workman has increased or diminished" save after hearing evidence on which to base such finding or findings? Counsel say:

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"If no consideration or weight whatever is attached to an arbitration, if the findings and awards of arbitrators are to be wholly disregarded, neither employer nor employee will avail themselves of the arbitration provisions of the statute. In order to give efficacy and value to the arbitration provisions of the statute, the awards of arbitrators are entitled to the same weight as are awards in common-law arbitrations."

But the only effect to be given is such as indicated by the language used by the Legislature in expressing its intention, and, as we have seen, a modification is contemplated in any of several contingencies, and, under certain circumstances, an actual cancellation. Whether the effect be desirable or not it is equally open to both parties and equally liable on the application of either to be accomplished. And this object seems equally obtainable after a full submission of all the evidence to the committee or after a hearing in the absence of one of the parties duly notified, as in this case. It is true, as counsel forcibly suggests, that by a mere written objection the plaintiff might have ended the committee's authority to hear the matter. But in spite of his failure to object and his failure to attend, he appears to have afterwards proceeded in the way marked out by the statute, and this puts the matter beyond our power to change.

[3] It is complained that the court allowed $150 for doctors' bills and hospital and medicine bills. The only thing in the abstract to support this is the statement that evidence was offered to show that the hospital and medicine bills amounted to $87. But the transcript has been procured, and it shows that one physician testified that charges for his services would probably run between $50 and $75. This with the other evidence furnished a fair basis for the allowance of $150.

[4] It is also asserted that no credit was given for money which was paid the plaintiff after the injury. The compensation committee found that the defendant had paid him $34.50 since the injury, and allowed additional compensation for ten additional days in March, 1918, of $10.80, being 60 per cent. of his average weekly earnings, for those days. After hearing the evidence touching the award of the committee, the court said, among other things:

"The fact remains that he did not appear before the committee and the fact remains that he did not accept any money. He did not take any money."

The plaintiff testified that on the Saturday after his injury on February 8th, he received pay for work done up to that time; that he stayed at the packing house from the 10th up to the 16th of February, and received $19.95. A representative of the defendant testified that after the injury he tendered the plaintiff the $18 allowed by the committee, and paid him $31.90 for work he had done, but this had nothing to do with "this compensation." From this confusion of evidence nothing appears which requires a modification of the allowance made by the court.

The judgment is affirmed.

All the Justices concurring.

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SUPREME JUDICIAL COURT OF MAINE

FISH'S CASE.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.

The Workmen's Compensation Act is constitutional.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SUPPORT OF DECREE—ESSENTIAL FACTS.

Under Workmen's Compensation Act, to sustain decree awarding compensation, it must appear from the evidence that the accident arose out of and in the course of the injured party's employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Appeal from Supreme Judicial Court, Penobscot County, at Law. Proceeding under the Workmen's Compensation Act by Llewellyn W. Fish. There was a finding by the chairman of the Industrial Accident Commission that the accident did not arise out of and in the course of applicant's employment, from which finding he appeals. Appeal dismissed.

Argued before Cornish, C. J., and Spear, Hanson, Dunn, Wilson, and Deasy, JJ.

L. B. Waldron, of Dexter, for plaintiff.
George W. Gower, of Skowhegan, for defendant.

PER CURIAM. [1, 2] This case arose under the Workmen's Compensation Act (Rev. St. 1916, c. 50). The appellant raises two questions: First, the constitutionality of the act; and, second, the validity of the finding by the chairman of the Industrial Accident Commission that the accident did not arise out of and in the course of the applicant's employment. The decision recently announced in re Mailman, which will appear in 118 Me. ——, 106 Atl. 606, settles both questions adversely to the claim of the appellant. In consonance with other courts of last resort, without exception, so far as we know, we hold the Workmen's Compensation Act to be constitutional, and the evidence in the case was ample to sustain the finding of facts by the commission under the rule adopted in the Mailman Case. The entry must therefore be:

Appeal dismissed.

*Decision rendered, June 25, 1919. 107 A. Rep. 32.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

HAMPDEN

PEROTTI'S CASE.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPOSITIONS—REVIEW—PRESENTATION OF QUESTIONS.

Where the claimant for compensation under the Workmen's Compensation Act, though attention was called to the subject of depositions, chose to go to hearing before the single member of the Industrial Accident Board without asking for the taking of depositions, the question whether there was an unreasonable refusal by the board to make request for the taking of depositions, under part 3, § 3, of the act, as amended by St. 1915, c. 275, is not presented.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MOTIONS TO TAKE DEPOSITIONS —AVERMENTS.

Averments in the motions to take depositions in proceedings under the Workmen's Compensation Act for death of a servant are not evidence, and cannot be taken as true.

(For other cases, see Master and Servant, Dec. Dig. § 406.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PRESUMPTION OF DEPENDENCY—WIDOW OF FOREIGN SUBJECT.

An alien's widow, residing in a foreign country, is not entitled to the benefit of the conclusive presumption of dependency established by the Workmen's Compensation Act, but the extent of her dependency on his wages is a question of fact.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DECISION OF BOARD ON QUESTIONS OF FACT—REVIEW.

The decision of the Industrial Accident Board is final on questions of fact, as the extent of dependency, where no presumption applies, and is not open to revision.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Hampden County.

Proceeding under the Workmen's Compensation Act by Angela Perotti for compensation for the death of Angelo Perotti, the employee, opposed by John Schena, the employer, and the Employers' Liability Assurance Corporation. Compensation was awarded, the award affirmed by the superior court, and from its decree the claimant appeals. Decree affirmed.

Silvio Martinelli, of Springfield, for appellant.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel) for appellee.

*Decision rendered, June 25, 1919. 123 N. E. Rep 776.

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RUGG, C. J. This is an appeal from a decree of the superior court entered in accordance with the findings and decision of the Industrial Accident Board, affirming and adopting those of the single member. It is conceded that the employee, a subject of Italy, received fatal injuries in the course and arising out of his employment by a subscriber under the act. This proceeding is brought by his widow, a resident of Italy.

At the hearing before the Industrial Accident Board a motion was made in behalf of the widow that depositions of witnesses be taken in Italy. This was denied. The reasons are not stated, but in that connection it is stated that at the hearing before the single member the insured objected that the testimony of the claimant should be taken by depositions. The single member overruled the objection and proceeded with the hearing. A motion was made in the superior court which, although quite informal, is treated as in substance a motion to recommit to the Industrial Accident Board in order that depositions of witnesses in Italy might be taken.

[1] It is provided by St. 1915, c. 275, amending part 3, § 3, c. 751, St. 1911, as theretofore amended, that "upon the written request of the board or of any member thereof," filed with the clerk of the superior court, commission to take depositions shall issue. The natural inference from the words of this statute is that ordinarily the decision whether such depositions ought to issue or not rests with the board or any member of it. See Derinza's Case, 229 Mass. 435, 438, 118 N. E. 942. It is not necessary to determine whether under any circumstances an unreasonable refusal by the board to make such request is reviewable. That question is not presented on this record. The claimant, although attention was called to the subject of depositions, chose to go to hearing before the single member without asking for the taking of depositions.

[2] There is nothing on the record except bald denials of the motions for the taking of depositions. The averments in the motions are not evidence, nor can they be taken as true. There is nothing to indicate that there was any real reason in their support or that they were not denied rightly.

[3, 4] The findings of the single member and of the board on review as to the extent of dependency involve no question of law. Manifestly the widow, under the circumstances disclosed, was not entitled to the benefit of the conclusive presumption of dependency established by the act. Nelson's Case, 217 Mass. 467, 105 N. E. 357. The extent of her dependency upon the wages of the deceased employee was a question of fact. Gorski's Case, 227 Mass. 456, 460, 116 N. E. 811. No ruling of law appears to have been made and none was requested. The decision of the board is final on questions of fact and not open to revision. Pass' Case, 232 Mass. ——, 122 N. E. 642, and cases there collected.

Decree affirmed.

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SUPREME COURT OF MICHIGAN.

ROWE ET AL.

v.

LEONARD WAREHOUSES, INC., ET AL. (No. 47.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE.

Where the evidence established that it was a part of the duty of deceased to frequently run elevator, and record does not show that condition of elevator was such as to require services of an electrician or a report to "elevator people," contention that deceased, killed while investigating elevator rope which "did not work right," was guilty of willful and intentional misconduct and sustained no accident which arose out of or in the course of his employment, will be overruled.

(For other cases, see Master and Servant, Dec. Dig. § 380.

Certiorari to Industrial Accident Board.

Proceedings for compensation by Sarah Rowe and another, opposed by the Leonard Warehouses, Incorporated, employer, and the Travelers' Insurance Company, insurer. Award for claimants, and the insurer brings certiorari. Award affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Vandeveer & Foster, of Detroit, for appellants.
Washington I. Robinson, of Detroit, for appellees.

MOORE, J. This is certiorari to review the action of the Industrial Accident Board in awarding compensation of $10 a week to Sarah R. Rowe, the widow, and Marjorie Rowe, the dependent child, of Herman Rowe, who was killed while in the employ of the Leonard Warehouses, Incorporated.

[1] The defendant insurance company is contesting the claim, contending that deceased sustained no accident which arose out of and in the course of his employment, and that deceased was guilty of intentional and willful misconduct. This contention is based upon the claim that it was no part of Mr. Rowe's duty to make repairs upon the elevator, and that he was doing so when killed.

There appears in the return of the Industrial Accident Board the following:

"He claimed the rope was tight and did not work right.

"Q. That the rope attached to the elevator? A. Yes; to stop the elevator.

"Q. How far were you from him? A. I was about five or six feet away from him.

"Q. And you raised the gate? Was that the gate that let in upon the floor from the elevator? What did you have to do; raise it with your hands? A. Raise with my hands. I just kept the door about three or four feet with my hands.

*Decision rendered, July 17, 1919. 173 N. W. Rep. 187.

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"Q. What did he do? A. Then he looked down to see what is the matter with that rope.

"Q. Did you see the elevator coming? A. Before I turned around, before I just turned around, the elevator was then about two inches before me. It was coming down right on him."

The testimony shows that the deceased was using the elevator. Said witness again testified:

"Q. If the rope was fastened, would he have to unfasten it at all? A. No; he used the elevator five or six times.

"Q. That day? A. Yes; we was up and down about five or six times. He claimed that the rope must be caught and did not work right; can't start the elevator.

"Q. So then he went to unfasten or unhitch the rope, I suppose? A. I did not ask him. He did not tell me. He just tell me to raise up the gate, hold the gate."

And again:

"Q. After the foreman went into the office, Mr. Rowe walked over to the elevator? A. Yes; he was standing about a couple of minutes. Then he says, 'I can't see what is the matter with the rope.'

"Q. You and he walked over? A. I went right with him, and he told me to raise up the gate.

"Q. After he raised up the gate did he raise the guard up? A. The guard up 2½ or 2 feet from the ground.

"Q. Then he laid down on his stomach with his head to the elevator shaft? A. And tried to get the rope loose to see what is the matter with it. I don't know what he done."

The testimony also shows that it was the usual thing for the deceased to use the elevator. There cannot be any doubt in this matter but that the accident did arise out of and in the course of the employment, and that it killed this man, and that he was not guilty of willful and intentional misconduct.

It may be well to quote some of the testimony given by the foreman who had been in the defendant's employ several years and who testified Mr. Rowe had been his helper for more than a year:

"Q. Again, what floor was it that his body was on? A. It was on the first floor in the warehouse.

"Q. Did his duties take him up on that elevator? A. Oh, yes; we were working at the present time on that floor about 20 feet from the elevator.

"Q. What disposition had Mr. Rowe shown before the accident? A. Good. He was in high spirits that morning. We were joking all the morning. We had both bought a Liberty Bond; joking about it in the morning. * * *

"Q. What type man was Mr. Rowe? A. Finest in the land; fine.

"Q. As to health?

"Mr. Vandeveer: I object.

"A. As far as his health he never complained. That I cannot say.

"Q. What age was he? A. I think he told me he was 53."

Counsel cite in support of their contention Bischoff v. American Car & Foundry Co., 190 Mich. 229, 157 N. W. 34, and Lobuzek v. American Car & Foundry Co., 194 Mich. 533, 161 N. W. 139, and claim they are controlling because of the following testimony of the foreman:

"Q. Just before this accident happened you were in the rear of the building rolling rugs, with Mr. Rowe and Mr. Rosenberg, were you not? A. Before the accident; yes.

"Q. You had occasion to leave those two men there and went into the front office to get some tags? A. No; some checking.

"Q. Checking? A. Yes; that is, to tag the rugs on and number

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them. (He testified the elevator had been running smoothly, apparently in good working order and nothing out of repair or anything that needed adjustment.)

"Q. Had not given either of the men any orders to use the elevator while you had left the room? A. No, sir.

"Q. Had you? A. No, sir.

"Q. Occasionally when adjustments were needed upon the elevator you would always notify the Otis people? A. Yes; the Otis people.

"Q. And they would come and repair it? A. Yes.

"Q. You had never requested Mr. Rowe to do that? A. No.

"Q. And it was not a part of his duties? A. No; not to repair.

"Q. Make repairs or adjustments? A. No.

"Q. Or to test it in any way? A. No.

"Q. Mr. Rowe's duties were those of a helper in handling furniture in the storeroom? A. Yes.

"Q. That is the trucking and the carting of it? A. Well, not cartage; no.

"Q. I mean handling it by truck? A. Oh, yes.

"Q. But not going out on any of the wagons? A. Not outside; no.

"Q. You had an electrician there? A. Yes.

"Q. And the electrician took care of the motor? A. Yes.

"Q. And the oiling such incidents as that as to the operation of the elevator? A. Yes.

"Q. And you never knew Mr. Rowe to make any repairs or adjustments upon the elevator? A. No.

"Q. And it was not any part of his duty to do it? A. No.

"Q. And you never requested him to do it? A. No; never asked him to do anything like that.

"Q. He was not engaged as a mechanic? A. No.

"Q. If he attempted to do that, he would be doing something that was not within the scope of his employment? A. If he did.

"Q. I say if he did? A. Yes.

"Q. He would not be doing anything within the scope of his employment? A. No.

"Q. Mr. Rowe's employment was to handle the furniture and to move it from one point to another in the warehouse and packing and things of that character? A. Of course, he would operate the elevator, up and down.

"Q. In moving furniture up and down? A. Yes.

"Q. But what I am speaking of is to make repairs and things of that kind? A. Oh, no.

"Q. That was something that the electrician of the Otis Elevator people attended to? A. Yes."

[2] It is not clear as to how much of this testimony was competent, as Mr. Rowe could not give his version of the situation. See Zoladtz et al. v. Detroit Auto Specialty Co., 206 Mich. 349, 172 N. W. 549, and Hanna v. Michigan Steel Castings Co., 204 Mich. 139, 170 N. W. 6. But if we regard the testimony as competent it does not bring the instant case within the cases cited by counsel for appellant.

The foreman testified that four minutes before the accident the elevator was running well. The evidence establishes beyond a doubt that it was part of the duty of the deceased to frequently run the elevator. The record does not show that it was in such a condition as to require the services of an electrician or that a report be made to the Otis Elevator people. The most that can be said of it is that the rope which operated it stuck. Suppose the gate or a door to an elevator stuck; could not the operator try to make it open? It would not tend to efficiency on the part of the employee if, when so simple a thing as happened occurred, he might not investigate.

The question involved is not new in this court. Some of the cases

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are Jendrus v. Detroit Steel Products Co., 178 Mich., 265, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476; Clem v. Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352; Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Redfield v. Michigan Workmen's Compensation Mutual Insurance Co., 183 Mich. 633, 150 N. W. 362; Gignac v. Studebaker Corporation, 186 Mich. 574, 152 N. W. 1037; Beaudry v. Watkins & Radcliff, 191 Mich. 445, 158 N. W. 16, L. R. A. 1916F, 576; Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F, 955; Poniatowski v. Stickley Bros. Co., 194 Mich. 294, 160 N. W. 569; Kent v. Boyne City Chemical Co., 195 Mich. 671, 162 N. W. 268; Oniji v. Studebaker Corporation, 196 Mich. 397, 163 N. W. 23; Cook v. Charles Hoertz & Son, 198 Mich. 129, 164 N. W. 464; Riley v. Mason Motor Co., 199 Mich. 233, 165 N. W. 745; McMinn v. C. Kern Brewing Co., 202 Mich. 414, 168 N. W. 542.

The award is affirmed, with costs to the claimants.

SUPREME COURT OF MICHIGAN.

RUDISKI

v.

DETROIT WIRE SPRING CO. ET AL. (No. 81.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —ORDERS OF INDUSTRIAL BOARD—HOLDING CASE OPEN.

Orders of Industrial Accident Board awarding compensation to an injured employee in accordance with the disability agreement between him, his employer, and the insurer, *held* inconsistent with the return of the board, to the writ of certiorari sued out by the employer and insurer to review such orders, which recited that its order merely meant the case should not be finally closed but should be held open for further developments.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Certiorari to Industrial Accident Board.

Proceedings by Wasye Rudiski, the employee, for compensation for injuries under the Workmen's Compensation Act, against the Detroit Wire Spring Company, the employer, and the General Accident, Fire & Life Assurance Corporation, Limited, the insurer. To review orders that the employer and insurer pay compensation in accordance with the terms of a disability agreement, they bring certiorari. Orders in so far as directing payment in accordance with the agreement vacated and set aside, and case remanded with instructions.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.

Solomon G. Paperno, of Detroit, for appellee.

*Decision rendered, July 17, 1919. 173 N. W. Rep. 189.

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STONE, J. The applicant entered the employment of the appellant, the Detroit Wire Spring Company, as a knotting machine operator about two years prior to August 15, 1917. On that date, while performing his duties as such operator, he received an accidental injury, to wit:

"Left eye cut by wire to left of center injuring iris, and penetrating lens enough to cause exudate of the lens fluid."

Necessary medical aid was provided by appellants, and, inasmuch as claimant was disabled for a period in excess of fifteen days, an agreement in regard to the payment of compensation was duly executed, whereby appellants were to pay to said employee compensation at the rate of $10 per week during period of total disability, and at the proper rate per week during partial disability, if he became legally entitled to compensation for partial disability; all in accordance with the provisions of the Michigan Workmen's Compensation Law (Laws 1912 [Ex. Sess.] No. 10). This agreement was duly filed with the Industrial Accident Board, and approved by the latter on October 10, 1917. There is no claim that applicant received any other injury as a result of accident than that above described.

Compensation was paid in accordance with the agreement from August 15, 1917, to December 19, 1917, a period of 18 weeks. During this interval appellants provided claimant with medical aid, and had him attended by several disinterested eye specialists who recommended that an operation should be performed to remove cataract from the injured eye. Appellants acted in accordance with the recommendation of said doctors, and an operation to remove cataract was performed by Dr. Grant. Within due course thereafter, appellants were advised by Dr. Grant that the cataract operation was successful, and that vision in the injured eye was substantially normal. Also, that claimant's condition was such that he was able to return to work for the Detroit Wire Spring Company, and perform the same duties as before said accidental injury. Appellants, after being thus advised, had a conference with claimant, and, in order to determine the true situation, had Dr. Campbell make a careful and complete examination of the injured eye. He, after giving the case necessary attention, confirmed Dr. Grant's report, by advising that the cataract operation had been entirely successful and that vision in the injured eye, with an adjusted lens was almost normal, being between 80 per cent. and 90 per cent. of normal, and was a very good result under the conditions.

Claimant returned to his work with the Detroit Wire Spring Company on December 10, 1917, and it is claimed by appellants that since his return he has been doing the same work as before the injury, and is receiving the same wages. He, however, refused to sign a settlement receipt, and appellants filed a petition with the Industrial Accident Board on May 1, 1918, to be relieved from further payments of compensation, and for such other and further relief as was just and proper.

On May 29, 1918, claimant filed a petition asking for compensation for the loss of the eye involved. Testimony in support of, and in opposition to, both petitions was submitted to the board in the form of depositions. In accordance with an agreement between counsel for both parties, Dr. Campbell made a further examination of claimant under date of July 27, 1918, and forwarded his report with reference thereto direct to the board under date of August 9, 1918.

Hearings on both petitions were held before the board, and on August 30, 1918, the board entered the orders complained of, as follows:

"Order denying appellee's petition. A petition having been duly filed by the applicant in the above-entitled cause, praying that he be awarded compensation as for the loss of an eye instead of for disability, and the same having come on for hearing before the board on July 9, 1918, and proof having been filed, and due consideration being had thereon, the board finds the applicant has not lost an eye; and it is ordered that

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said petition be, and the same is hereby denied, and that applicant is entitled to receive compensation in accordance with the terms of the agreement approved by the board October 10, 1917."

"Order denying appellants' petition. A petition having been filed by respondents in the above-entitled cause, praying for reasons therein set forth that they be relieved from making further payments of compensation in the case, and the same having come on for hearing before the board on July 9, 1918, and proof having been filed, and due consideration being had thereon; it is ordered that said petition be, and same is hereby denied, and appellant is entitled to receive compensation in accordance with the terms of the agreement in regard to compensation, approved by the board on October 10, 1917."

On September 28, 1918, appellants filed a petition in this court for the writ of certiorari, and assigned error as follows:

(1) Industrial Accident Board did not have the jurisdiction, power, or authority, to order appellants to pay compensation in accordance with the terms of the disability agreement approved by the board, inasmuch as appellee had returned to his employment, was doing the same work and receiving the same wages as at the time of the accidental injury, and that he was not either totally or partially disabled.

(2) The action of the Industrial Accident Board in entering the order complained of is contrary to the terms and conditions of the Michigan Workmen's Compensation Act, so called.

After the petition for the writ was filed in this court, and before action thereon had been taken, it seems to be conceded that the applicant obtained from the board a certified copy of the orders above set forth, upon which he obtained a judgment in the circuit court for the county of Wayne for $430 against the appellants covering 43 weeks, from the 17th day of December, 1917, to the 17th day of October, 1918. Subsequently, by stipulation of counsel, this judgment was vacated. We refer to this subject as indicating the understanding which both the board and the applicant must have had, as to the force and effect of the orders of the board of August 30, 1918.

In its return to the writ of certiorari, the Industrial Accident Board, among other things, answered as follows:

"And said board further returns in this connection that said order did not mean that said respondents were required to pay any compensation whatever to applicant during any time during which he was not disabled as a result of the accidental personal injury he received from earning full wages in the occupation in which he was injured, but that, upon the testimony submitted, the board did not feel justified in concluding that the injurious effects of the injury were over. The testimony was in such condition that the board could not tell whether the injured employee might not in the future, and within the limitations of time provided for in the Workmen's Compensation Law, lose his eye entirely as a result of the accident, and the board could not tell whether during the limitation of time fixed in the Workmen's Compensation Law, the injured employee might not be partially or totally disabled from earning and thus entitled to compensation. In other words, the order entered by the board merely meant that the case should not be finally closed by order of the board, but that it should remain open pending developments. While it so remains open, the respondents are not required to pay compensation to the injured employee to cover any time during which he is not prevented by the accidental personal injury from earning full wages in the occupation in which he was injured. The agreement referred to in the said order was to the effect that respondents should pay applicant ten ($10.00) dollars per week during total disability, and at the proper rate per week during partial disability if he became legally entitled to compensation for partial disability, or in accordance with the provisions of the Workmen's Compensation Law. That agreement did not mean, in

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the judgment of the board, that applicant should be paid any compensation whatever (unless for the total loss of the eye) during any time during which his earning capacity was not diminished as a result of the accidental personal injury he received. The testimony convinced the board that the injured employee still suffered a disability caused by the accidental personal injury he received, but that at the time the testimony was taken he was earning as much wages as when he was injured and therefore not at that time entitled to be receiving compensation. The board entered the order it did enter because it believed that the testimony taken as a whole would not warrant the board in finding that the disability of the injured employee on account of the accident was at an end, but the order does not require the respondents to pay the injured employee while he is able to earn as much wages as he was earning when he was injured."

In our opinion the return of the Industrial Accident Board is inconsistent with its orders awarding compensation in accordance with the agreement, above set forth. Conceding that there was testimony which justified the board in holding the case open for further developments, its orders were not warranted; and its return that it did not mean that appellants should pay compensation to the injured employee to cover any period of time during which he was not prevented by the accidental personal injury from earning full wages in the occupation in which he was injured, is inconsistent with its orders. It is apparent that the said orders of the board, as acted upon by the claimant, are inconsistent with this return and should not stand. Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 N. W. 851.

So much of the orders of the board above set forth as direct payment in accordance with the agreement are vacated and set aside, and the case will be remanded to the Industrial Accident Board, with instructions to enter an order in compliance with its answer in the return to the writ of certiorari.

Reversed and remanded.

SUPREME COURT OF MICHIGAN.

MARSHALL

v.

BAKER-VAWTER CO. ET AL. (No. 64.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ASSAULTS BY EMPLOYEES—"ARISING OUT OF EMPLOYMENT"—"INCIDENT TO EMPLOYMENT."

If one employee assaults another employee to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant, and cannot be said to arise either directly out of the employment or as an incident of it within the meaning of the Workmen's Compensation Law, but when an employee is assaulted while he is defending his employer or his employer's property, or his employer's interest, or when the assault is incidental to some duty of his employment, the injuries he suffers in consequence arise, as a rule, out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

*Decision rendered, July 17, 1919. 173 N. W. Rep. 191.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—QUESTIONS OF FACT.

Whether an employee who was shot by another employee received his injuries as an incident of his employment, or merely from the voluntary act of the assailant, to gratify a feeling of anger or hatred, *held* a question of fact for the Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—BURDEN OF PROOF.

The burden is upon one applying for compensation under the Workmen's Compensation Law to show that his injuries arose out of the employment, or as an incident of it.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Certiorari to Industrial Accident Board.

Proceedings by Dennis Marshall under the Workmen's Compensation Act (Acts 1912 [Extra Sess.] No. 10), to obtain compensation for personal injuries opposed by the Baker-Vawter Company, the employer. The Industrial Accident Board refused to allow compensation, and the claimant brings certiorari. Finding of board affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Ara Weldon and Cady & Andrews, all of Benton Harbor, for appellant.

Beaumont, Smith & Harris, of Detroit, and Frank N. Crosby, of New York City (Albert E. Meder, of Detroit, of counsel), for appellee.

Bird, C. J. Claimant was an employee of defendant, a printing or publishing house, in October, 1916. His work was that of foreman of the composing room. While engaged in his duties on the morning of October 3, 1916, he was shot in the back of the head by Harry Fields, a negro janitor, employed in the same place. He was taken to the hospital, and remained there until October 17th, when he returned to his work and continued therein until April, 1917, when he gave up his position on account of impaired eyesight. The particular defect is that the lower portion of his field of vision is so affected that it seriously interferes with his regular work. He filed a claim with the Industrial Accident Board, and the committee of arbitration allowed him compensation, one member dissenting. An appeal to and hearing by the Accident Board resulted in a denial of plaintiff's claim. The board found that the accidental personal injury sustained by the applicant did not arise out of or in the course of his employment. The proceedings are now before us for review on certiorari.

It was made to appear by the proofs that plaintiff was foreman of the composing room, and as such had a right to give orders with reference to the janitor work therein; that in the event his orders were not carried out by the janitor he reported the matter either to Williams, the assistant superintendent, or McDuffie, the foreman of the janitor service. That a day or so previous to the shooting plaintiff had reported the janitor for failure to obey his orders in cleaning up some portion of the room, and that he had on other occasions made similar complaints. It was further shown that the janitor had had difficulty with another employee, and that two or three years previous to the shooting he had been convicted of assault with intent to do great bodily harm less than the crime of murder, and sentenced to a term in Jackson prison; that he was

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subsequently paroled and took up his work again with defendant company. The janitor's testimony was taken by deposition in the prison. He was asked:

"Q. Was there any difference or trouble between you and Mr. Marshall? A. He did not want me to work there; he was always going to Mr. McDuffie, and so Mr. McDuffie told him to leave me be; that I would do my own work.

"Q. Did you and Mr. Marshall have any trouble, or trouble of any kind, in regard to your work? A. No, sir. If he ever asked me to do anything, I would go ahead and do it. * * *

"Q. What was the real cause of your shooting Mr. Marshall? A. Because he made an attempt to shoot me."

[1] It is the contention of plaintiff that his injuries arose out of and in the course of his employment, and he relies on the following cases to sustain his position: The case of McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310; Mitchinson v. Day Bros., 1 K. B. 603; Workmen's Comp. R. 1913, 324; Knopp v. Amer. Car & Foundry Co., 186 Ill. App. 605; Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344; Ohio Bldg., etc., Co. v. Ind. Board, 277 Ill. 96, 115 N. E. 149; Carbone v. Loft, 219 N. Y. 579; 114 N. E. 1062; Missouri, K. & T. Ry. Co. v. Day, 104 Tex. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111; Thom v. Sinclair, Ann. Cas. 1917D, 188; Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152.

Defendants argue that plaintiff's injury did not arise out of his employment, but was the result of personal vengeance on the part of Harris, and the following cases are cited to sustain their position: Walther v. Am. Paper Co., 89 N. J. Law, 732, 99 Atl. 263; Schmoll v. Brewing Co., 89 N. J. Law, 150, 97 Atl. 723; Union Sanitary Mfg. Co. v. Davis (Ind. App.) 115 N. E. 676; Jacquemin v. Turner, etc., Co., 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496; Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; Shaw v. Wigan, etc., Co., 111 B. W. C. C. 81; Clark v. Clark, 189 Mich. 652, 155 N. W. 507.

An examination of these authorities does not disclose any material disagreement over the test which should be applied. Some of them are close cases—near the line, as is the present case. In all, or nearly all of them, the same test is applied, namely, whether the attack grew out of the employment, out of the work, or was one of personal vengeance. The rule is well stated in Jacquemin v. Turner, etc., Co., 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496:

"If one employee assaults another employee solely to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant, and cannot be said to arise either directly out of the employment or as an incident of it. But when the employee is assaulted while he is defending his employer, or his employer's property, or his employer's interests, or when the assault was incidental to some duty of his employment, the injuries he suffers in consequence of the assault will, as a rule, arise out of the employment. He will then be serving his employer's ends and not his own."

The disagreement of counsel arises not so much over the law as over the application of the rule of law to the facts. Plaintiff insists the facts show two things: First, that the shooting was the result of disagreement with Harris over the work in which they were employed; second, that Harris was a quarrelsome and dangerous fellow, and unsafe to be permitted to work with his fellows, and this fact was known to his employer. Defendant takes issue upon both of these propositions.

[2, 3] There is some, but not much, conflict in the testimony. It is, however, subject to different inferences. The plaintiff draws one inference from the testimony and the defendants another. Both the conflict

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and inferences were matters for the board. Upon the first proposition the board finds that the accident did not arise out of the employment. They conclude their finding with these words:

"It would seem that there might have been some reason for the shooting, but we are absolutely unable to discover what it was."

Upon the second proposition they find as follows:

"It is true that Fields had been sent to Jackson prison for an assault with intent to do great bodily harm, but we do not think it necessarily follows that he was such a person as the respondent employer would not have the right to employ as a janitor."

The burden of proof upon both of these propositions rested upon the plaintiff. We are of the opinion that the testimony is fairly open to either inference. Quite likely persons of equally good judgment might differ as to the inferences to be drawn from the testimony. The Accident Board has made a finding of fact on both propositions adverse to plaintiff's contention, and therefore we think we must fail. The finding of the board is affirmed.

SUPREME COURT OF MICHIGAN.

KIRCHNER

v.

MICHIGAN SUGAR CO. ET AL. (No. 87.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AVERAGE WEEKLY WAGE—DETERMINATION OF COMMISSION.

Where an injured servant was not employed by a sugar company for the year, but for its "campaign" of about 90 days only, during which his wages were $3 a day, the Industrial Accident Board properly determined, after an agreement had been made between the commissioner of insurance and the employee for payment of compensation of $10 a week, that the average weekly wage of the employee was less than $4, the determination being made on petition for modification of the agreement for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT — AGREEMENT FOR COMPENSATION — MODIFICATION BY BOARD.

Where the commissioner of insurance agreed with the injured foreman of a sugar company that the foreman should receive compensation payments of $10 per week during disability, an agreement approved by the Industrial Accident Board, the board, so long as the matter was depending before it, had the power subsequently to limit payments to the injured servant to the amount of his average weekly wage.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Certiorari to Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act by Theodore Kirchner, the employee, against the Michigan Sugar

*Decision rendered, July 17, 1919. 173 N. W. Rep. 193.

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Company, the employer, and the State Accident Fund, the insurer. An agreement as to compensation was made, and subsequently the insurer by the commissioner of insurance asked to be relieved from further payments, and to review such an order the employee brings certiorari. Order affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

R. L. Crane, of Saginaw, for claimant.
Kerr & Lacey, of Detroit, for respondents.

OSTRANDER, J. Claimant was employed as yard foreman by the Michigan Sugar Company at its factory at Carrollton, Mich. He was injured. He was earning $3 a day seven days in the week. The State Accident Fund was the insurer of the Michigan Sugar Company. An agreement for compensation was made between the commissioner of insurance and the claimant, which provided for the payment to claimant of $10 per week during disability. This was approved by the Industrial Accident Board. Accordingly compensation was paid from date of accident, November 16, 1916, to March 4, 1918, when the commissioner of insurance, by petition, asked to be relieved from further payments, alleging he had been informed and believed that claimant had fully recovered. It was also set up that claimant had been employed at labor for wages in the fall of 1917, and it was asked that for the period he was employed he refund the money paid from the State Accident Fund. After a hearing, the Industrial Accident Board, June 20, 1918, made its order denying, generally, the relief prayed for, but granting relief as follows:

"It is further ordered that as respondents paid compensation to applicant during the two months while he was working for the city of Saginaw, and during the time from October 11, 1917, to December 7, 1917, during which time applicant was not entitled to compensation, therefore respondents shall have the right to set off the compensation erroneously paid to cover said periods against any other compensation to which applicant is now or shall hereafter be entitled under the terms of this order."

This order was not reviewed. On August 20, 1918, the defendants in ceritorari filed with the Industrial Accident Board another petition, alleging therein that claimant was fully recovered, and praying also for a modification of the agreement for compensation. Modification of the agreement and demand for refunding of payments made were asked for upon the ground stated in the said petition as follows:

"(6) Your petitioners represent further that at the time said claimant received the accidental injury heretofore referred to that his employment with said respondent and petitioner, the Michigan Sugar Company, was what is known and designated under the law of this state, as irregular or seasonable employment, that said claimant's employment with said respondent and petitioner Michigan Sugar Company was not continuous, inasmuch as the operations of the latter, and in which said claimant was employed, were carried on for a period not to exceed 120 days in the course of a year's time.

"Respondents and petitioners also show that the compensation agreement heretofore referred to, and under which all payments have been made, is inapplicable to the situation presented in the instant case, and that said agreement was executed and payments thereunder were made through mistake and misunderstanding on the part of said respondents and petitioners, that as a result thereof said claimant has received compensation far in excess of the amount he is legally or equitably entitled to receive; that the agreement in regard to compensation should be modified, the amount said claimant was justly entitled to receive should be

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computed in accordance with the terms and provisions of the compensation law, and the construction placed thereon by the honorable Supreme Court of the state of Michigan. Also that said respondents and petitioner should be entitled to receive and recover from said claimant the amounts which were paid to him through aforementioned mistake of law and fact."

There was a hearing, and thereafter a finding and final order, which order the claimant reviews here. Certain recitals and conclusions appearing in the order are:

"The board finds as a fact from the entire files and testimony in the case that the agreement approved December 21, 1916, was entered into by respondents through a mistake, and that said agreement provides for compensation in excess of the amount for which said respondents are liable; that the employment in which applicant was engaged was seasonal, and in computing the compensation to be paid said applicant the only wages that could be considered were those earned by applicant during the period said respondents' plant was in operation, said period being approximately 90 days each year; that said applicant was earning $3 a day, employed seven (7) days a week, and that when the compensation in this is computed properly said applicant should receive as for total disability $4 per week, instead of the amount specified in the agreement on file; that said respondents have the right to set off the moneys, viz. $4, the proper weekly rate of compensation, viz. $4 and which the applicant was not entitled to receive against the compensation to which the said applicant is now or may hereafter be entitled under the terms of this order until the total amount of moneys overpaid is consumed. The board further finds that said applicant is at the present time totally disabled in the employment in which he was engaged when injured, and that said applicant should receive compensation at the rate of $4 per week during the period of such total disability.

"It is therefore ordered and adjudged that said petition should be, and the same is, hereby granted so far as the modification of the agreement is concerned, and that weekly rate of compensation should be, and the same is, hereby fixed at $4 during the period of applicant's total disability, dating from the day of the accident November 16, 1916; and that the total sum overpaid by said respondents shall be applied on the future compensation payable to said applicant until such overpaid amount is entirely consumed."

The position of plaintiff in certiorari is shortly stated in his brief as follows:

"The petition asks defendants be entitled to receive and recover from said claimant the amounts which were paid to him through aforementioned mistake of law and fact.

"What mistake? Who made it? Are they mistakes of law or fact? Upon what facts are these conclusions in pleading made? Taking out the 'fact' found by the board, that claimant is and has been totally disabled by the accident, what fact is pleaded or proven to warrant the order of November, 1918? Nothing. It is too fundamental for doubt that in all judicial proceedings the pleader must state facts clearly and broad enough to sustain proofs of the claims alleged, and establish them. In no pleading should one be required to be more definite and specific than in asking to be relieved from his agreements. If defendants claim mistake in fact (in absence of fraud) they should be required to plead properly, and then establish by proof that the agreement should be avoided through mistake of fact. The only claim in either petition of defendants is that claimant had recovered. The board settled that issue in claimant's favor. Disability is established by the agreement and by two orders of the board. This point covers the facts and reduces the

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claim of defendants to one of law. This claim is not pleaded except by inference, and cannot avail, because mistakes of law are not sufficient to impair contract obligations.

It is also claimed for him that the provisions of Act 21, Public Acts of 1917, are controlling here.

[1] Of course, the proceeding before the Industrial Accident Board is not a judicial proceeding, and there are, strictly, no pleadings. The board is set up to administer the compensation law, in doing which it acts principally as a trier of facts. It did not, in the first instance, in this case, determine the facts. The parties agreed that there had been an accident; that claimant was then totally disabled and was entitled to compensation. Without any fraud, so far as is claimed or disclosed, upon the part of either, the rate of weekly compensation was fixed at the maximum because claimant's weekly wages were more than twice the amount of the statute maximum. But they were mistaken in supposing that claimant was entitled to receive one-half his weekly wages, but not more than $10. They were mistaken because, while the Michigan Sugar Company employed men all of the year, it employed many more men for a brief season only, the season of the campaign. Claimant was not employed by the year, but for the campaign only. He had no such employment at any other time. His employment, yard boss, was peculiar to the work of the campaign. He is claiming that he is still disabled, not because he cannot do work—he admits in his testimony that he has done and can do many things—but because he is still disabled from doing the work which that particular employment required. The average season for the employment is 90 days; his wages were $3 a day. Beyond these, there are no factors which may be properly used in applying the statute to ascertain what his average annual earnings in that employment were. The Industrial Accident Board determined, and with their computation, according to the theory stated, no fault is found, that claimant's average weekly wage was less than $4.

There is evidence to sustain the findings and conclusion of the board. The law as announced in Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724, supports the final conclusion and order of the board. The amendment of the law of 1917 (Act 41) is not applicable, because the accident in question occurred in 1916.

[2] But if the agreement of the parties, though made by mistake, is conclusive, compensation must still be paid at the agreed rate. We think it is not conclusive. The purpose of the compensation law is compensation at rates which the law itself, directly or indirectly, but certainly, fixes. Claimant is entitled to receive, and his employer is obligated to pay, no more and no less than the statute compensation. We are not called upon to decide whether, an agreed but a too large or too small compensation having been paid by agreement, and the period of payment having ended, and all payments having been made, by commutation or otherwise, either party may have recourse against the other, by action of the Industrial Accident Board or otherwise. But so long as the matter is depending before the board we are of opinion that in the due administration of the law it has power to so limit payments, by its orders, that the statute sum, no more, no less, shall be paid and received, and to make such an order as was made in this proceeding to bring about, so far as possible, such desired and lawful result. The order reviewed in terms and in fact takes nothing from plaintiff in certiorari to which, under the law, he is entitled. It may leave him possessed of a larger sum than the one to which he was entitled. If its effect shall be to give him no less than the compensation which the law has said he shall have, his rights, under the law, have been duly respected.

The order is affirmed, with costs to the defendants in certiorari.

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SUPREME COURT OF MICHIGAN.

SHAFFER

v.

D'ARCY SPRING CO. ET AL. (No. 7.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD.

An award of the State Industrial Accident Board allowing a ser- t $6 a week for 23 weeks and fixing the amount of compensation already due at the time of award must be considered, not as an award in a lump sum, but an award for weekly payments, which the Industrial Board is authorized to review under Workmen's Compensation Act, pt. 3, § 14, and not res adjudicata.

(For other cases. see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD—CONCLUSIVENESS OF INDUSTRIAL BOARD'S FINDING OF FACT.

On certiorari to the State Industrial Accident Board the Supreme Court will not review a finding of fact nor weigh the evidence where there is evidence to sustain the findings.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to Industrial Accident Board.

Application by Isaac F. Shaffer to review a former order of the Industrial Accident Board awarding him weekly payments and to increase and extend the same on account of his failure to recover from his injuries, opposed by the D'Arcy Spring Company, employer, and the Prudential Casualty Company, insurer. Award made increasing and extending such payments, and the employer and insurer bring certiorari. Award affirmed.

Argued before Bird, C. J.; and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Jackson, Fitzgerald & Dalm, of Kalamazoo, and Fred J. Ward, of Detroit, for appellants.

Charles L. Dibble, of Kalamazoo, for appellee.

KUHN, J. The facts which are necessary to understand this proceeding, which is certiorari to the Industrial Accident Board, can be had by reading the opinion of this court reported in 199 Mich. 537, 165 N. W. 825. By that opinion it was held that, because of the fact that with reference to certain depositions that were offered in evidence it was found that the notice was clearly irregular under the recent holding of this court in Hamilton v. Macey Co., 195 Mich. 747, 162 N. W. 289, the proceeding must be vacated, "and the case remanded for further action in accordance with the rules and practice of the board." Subsequently a motion for rehearing was filed, which was denied, and the case being then before the Industrial Accident Board, a new petition was filed, bearing date January 31, 1918, with the intention, and upon the theory of reinstating the proceedings before the

*Decision rendered, July 17, 1919. 173 N. W. Rep. 201.

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board in the same manner as the petition of April 8, 1916, which appears from the petition itself, and the petition was so regarded by the board. After filing the petition of January 31, 1918, the parties proceeded again to present evidence to the board. It was stipulated through the respective attorneys that the testimony of all the witnesses who had previously made depositions upon the first hearing of this case, in order to avoid expense, might be used upon the new hearing. Both parties also took voluminous additional testimony by deposition, which was submitted. The Industrial Accident Board, after consideration of the evidence, on September 12, 1918, entered an order for the payment of $6 a week compensation from the date of the last payment made to the claimant in this cause up to the time of that order and for the same amount for the future so long as he seemed to be totally disabled. It is this order which is now before us for review.

The claims of the respondents for a reversal of the action of the Industrial Accident Board are stated in their brief as follows:

"First. Because the claimant and respondents submitted claimant's claim to a committee on arbitration, which committee met on the 9th day of December, 1914, and awarded claimant the sum of $138 and a physician's bill in amount of $4.50, all of which has been paid, and that neither the claimant nor the respondents appealed from said order, in accordance with the provisions of section 8, pt. 3, Act No. 10 of the Public Acts of 1912, and in consequence thereof the decision of said committee on arbitration became resadjudicata of the rights of said claimant for compensation for the injury alleged to have been suffered by him while in the employ of the D'Arcy Spring Company on the 15th day of June, 1914.

"Second. No order has ever been made or entered extending the time within which the claimant might appeal from the award of the committee on arbitration.

"Third. No determination has been made by the board or showing made by the claimant which would entitle claimant to an extension of time within which to review the action of the committee on arbitration.

"Fourth. No appeal was ever taken by the claimant or respondents from the order dismissing claimant's petition filed on or shortly after the 9th day of April, 1915, and which petition is known as Exhibit D, and appears in the record on pages 53 to 55.

"Fifth. The evidence does not show that varicose veins, being the only disability under which claimant suffers at the present time, and for which he now seeks compensation, grew out of the alleged injury on June 15, 1914, that such disease known as varicose veins existed previous to June 15, 1914, and that the claimant has entirely recovered from any effects resulting from the alleged injury suffered by him while in the employ of the D'Arcy Spring Company."

[1] With reference to the first four assignments of error above set forth, it seems that the contentions of counsel for defendants and appellants are based upon the claim that the award on arbitration of December 9, 1914, was an award for a lump sum payment instead of for weekly compensation. The award reads in part as follows:

"Isaac Freeman Shaffer is entitled to receive and recover from said respondents the sum of $6 per week for a period of 23 weeks from the 2d day of July, 1914, and that said applicant is entitled to receive and recover from said respondents on this date $138, being the amount of such compensation that has already become due under the provisions of law, being all of said compensation, the same being now due also for medical bill the sum of $4.50."

The order of the board of November 2, 1916, which was referred to in the previous opinion of this court, reads as follows:

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"It is ordered and adjudged that said applicant is entitled to receive and recover from respondents compensation at the rate of $6 per week from the date of the last payment to November 22, 1916, making a total now due of $624; this to close the case."

The latter order was clearly considered by this court as an order for weekly payments, because in considering the claims of counsel Mr. Justice Bird, in writing the opinion, says:

"Because the board refused to reopen the case in June, 1915, it is said that order is res judicata of the present application. The compensation act (part 3, § 14 [2 Comp. Laws 1915, § 5467]) provides that 'any weekly payment under this act may be reviewed by the industrial accident board at the request of,' etc. There appears to be no restriction on the power given to the board to review its former orders for weekly payments, and we think it was contemplated that it should have this power."

In our opinion this determined that the order of November 2, 1916, was an order for weekly payments, and it necessarily follows under this holding that the award of December 9, 1914, must be also considered as an award for weekly payments, thus bringing it clearly under the previous decision of this court and making section 14, pt. 3, of the Compensation Law applicable. It follows, therefore, that the contention now urged by counsel must be considered as having been ruled upon adversely to the contention of the respondent by our previous decision.

[2] By the fifth assignment of error it is urged that the claimant's present condition is not the result of the injury of June 15, 1914. It is the claim of counsel for claimant that, while this question was not pressed by the respondents upon the previous appeal, it is very obvious that, if the condition of the claimant had not been due to the injury which is the basis for his compensation, then this court should have, and would have, entered an order dismissing the entire proceeding. However that may be, a careful reading of the record satisfies us that there was sufficient evidence to sustain the finding of the board upon this question. We have often held that this court will not review a question of fact found by the board, unless there is no evidence upon which to base such finding. With reference to this contention, it is only necessary to quote the following testimony of Dr. Cook:

"Q. Now you said a moment ago in answer to Mr. Dibble's question that this varicose condition which you found there might have resulted from an injury? A. Yes.

"Q. Would you say that it was reasonably certain that it did? A. My belief is that it resulted from an injury.

"Q. That is not just the question. In your opinion, is it possible to say with reasonable certainty that it did? A. In view of the history of this particular case, I would say it is reasonably certain that the ulceration was produced by injury."

This evidence was rebutted by the opinion evidence of other experts summoned by respondents. We will not weigh the evidence, which is the sole province of the Industrial Accident Board.

Finding no error in the proceedings, it follows that the award made by the board must be affirmed.

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SUPREME COURT OF MICHIGAN.

COUSINEAU

v.

BLACK. (No. 50.)*

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—CASUAL EMPLOYMENT.

One employed only to assist in moving and erecting a monument, which work continued less than two days, *held* casually employed, and not entitled to compensation for injuries in view of Workmen's Compensation Act, § 7.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

Certiorari to Industrial Accident Board.

Application by Charles L. Cousineau to the Industrial Accident Board, for an award for personal injuries, opposed by Frank D. Black, alleged employer. Award of compensation, and employer brings certiorari. Award set aside.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Rodgers & Rodgers, of Grand Rapids, for appellant.
Arthur J. Butler, of Big Rapids, for appellee.

BROOKE, J. Certiorari to the Industrial Accident Board. Defendant is a monument dealer in Grand Rapids. Through an agent, Mr. Soule, he had sold a monument to one Mrs. Parks, who was the mother-in-law of the claimant. The monument was to be set up in the cemetery at Paris, Mich. The cemetery was four miles from Paris, and it was necessary to have the monument drawn from Paris to the cemetery and set up. Mrs. Parks, the purchaser, was advised of these facts when she purchased the monument. The agent asked her whether she could send a team to haul the monument and be there herself. Upon receiving a negative answer as to her being present, the agent advised her that it would probably be more satisfactory to her to have some of her folks there. She inquired whether she must stand the expense, and was informed by the agent that—

"We stand that. We pay all bills, but you get your son, for probably it would be more satisfactory to you to have some of your folks there when it is set up."

Mrs. Parks' home was in Big Rapids. She was not living with claimant, and claimant was unknown in the transaction or to the defendant or his agent up to that time. On August 8, 1918, she was notified by defendant to comply with his arrangements made with defendant's agent on August 9th. She sent her own team and her son-in-law, the claimant, to Paris. She testified:

"Q. You picked out the team to send and the man to send and sent them down to Paris? A. I sent my own team and got the man to go with it.

"Q. The selection of the man to go with the team was made by

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you? A. Yes; for I did not know who else to send; they were all busy, and the only one I thought of was my son-in-law, so I asked him to go with the team."

Defendant had shipped the monument to Paris, and sent his workman, a Mr. Gillies, there to set it up. When claimant got to Paris he found Gillies there. Gillies asked claimant if he could help him do the job. Claimant replied that he could if there was enough in it. Gillies asked him what he wanted, and he replied $5 a day. This included the team of Mrs. Parks for which she expected compensation. Claimant never asked for nor received any compensation from defendant for his services. He testified:

"Q. Did you ever present a bill to Mr. Black for the work you did do? A. No, sir; I didn't myself.

"Q. Did anybody ever do it for you that you know of? A. Not for me. The man that was on the farm sent in a bill for team work. He had to run over to the graveyard and see what condition it was in and to get the team, and he sent a bill in for his time and getting the team."

In removing the monument from the car and attempting to load it upon the wagon, one of claimant's thumbs was crushed, resulting in the amputation of the first phalange. The erection of the monument was completed the following day. Upon the foregoing facts the board made an award of $9 per week for a period of 30 weeks.

In reviewing said award defendant asserts:

(1) Plaintiff was not an employee of the defendant at the time of the injury or at any time.

(2) The employment of plaintiff, if any existed, was but casual.

1. We find it unnecessary to pass upon the question here involved.

2. Section 7 of the Workmen's Compensation Act (Acts [Ex. Sess.] 1912, No. 10) provides:

"Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employees, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

Of claimant's employment in the case at bar it may be said, as it was said in the case of Dyer v. James Black Masonry & Contracting Co., 192 Mich. 400, 158 N. W. 959 (quoting from Gaynor's Case, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363):

"It would be difficult to conceive of employment more nearly casual in every respect than was that of the employee in the case at bar."

Claimant, if employed by defendant, was employed only to assist in moving and erecting the monument, which work actually consumed less than two days. Upon this point see, also, Hill v. Begg, L. R. (1908) 2 K. B. 802, Ritchings v. Bryant, 6 B. W. C. 183; Cheevers' Case, 219 Mass. 244, 106 N. E. 861, and Blood v. Industrial Accident Commission, 30 Cal. App. 274, 157 Pac. 1140.

The award is set aside.

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SUPREME COURT OF MICHIGAN.

CORKIN

v.

RIVER RAISIN PAPER CO. ET AL. (No. 28.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE—INCAPACITATION—EVIDENCE.

Evidence *held* to sustain finding of Accident Board that during more than three months of the six months' period given injured employee to file claim by Workman's Compensation Act, pt. 2, § 15, employee was physically and mentally incapacitated from making claim.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FILING OF CLAIM—STATUTES.

Workmen's Compensation Act, pt. 2, § 15, requiring notice of claim of injury within six months after accident, "or in the event of his physical or mental incapacity, within six months after * * * removal of such physical or mental incapacity," construed so that, regardless of whether incapacity immediately follows accident, subsequent incapacity during the period will flag the statute.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Certiorari to Industrial Accident Board.

Proceedings under Workmen's Compensation Act by John Corkin for compensation for injuries, opposed by the River Raisin Paper Company, employer, and the Michigan Workmen's Compensation Mutual Insurance Company, insurer. Award by committee of arbitration approved by Accident Board, and employer and insurer bring certiorari. Affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Beaumont, Smith & Harris, of Detroit (Hal H. Smith, of Caro, and Albert E. Meder, of Detroit, of counsel), for appellants.

Alexander & Cotter and Campbell, Dewey & Stanton, all of Detroit, for appellee.

BIRD, C. J. Plaintiff is a brick mason. When injured he was in the employ of the River Raisin Paper Company. On June 29, 1917, while engaged in his work on a scaffold, he slipped and bruised his chin. When his working hours were over he applied an antiseptic to his bruise. The injury gave evidence of healing in the ordinary manner, and he continued to work. On July 7th, his leg began to swell, but he worked on until July 13th. He then laid off and remained quiet until July 19th, when he consulted a physician, and on the following day, July 20th, it was determined that he was suffering from erysipelas in his injured leg. He was at once taken to Herman Keefer Hospital, where he remained in quarantine until November 16th, when he was transferred to Harper Hospital, and he remained there until January

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5, 1918. A week later he had so far recovered his strength that he was able to walk about, and he visited his attorneys. They made a claim for him to the Industrial Accident Board on January 14, 1918. An award of $10 a week was made by the committee of arbitration, and the same was approved on appeal by the Accident Board.

The principal defense urged by the defendants is that plaintiff did not file his claim within the six months provided by the statute (Pub. Acts [Ex. Sess.] 1912, No. 10). Plaintiff concedes that his claim was not filed within the six months' period, but excuses the delay on the ground that during his stay at the Herman Keefer Hospital he was incapacitated, both physically and mentally.

Upon that issue the board made the following finding:

(e) That from July 20, 1917, to November 16, 1917, the applicant was physically and mentally incapable of making a claim for compensation within the meaning of the exception contained in section 15 of part 2 of the Workingmen's Compensation Law, and that said 3 months and 26 days should be excluded in computing the limitations applicable to the facts in this case.

It is argued by defendants in this court:

(1) That the foregoing finding of fact is not justified by the record.

(2) That, if it is, the statute commenced to run at the date of the injury, and that, having commenced to run, the statute would not be flagged by the subsequent mental and physical incapacity of plaintiff.

[1] 1. The testimony discloses that during plaintiff's stay at the Herman Keefer Hospital he was in quarantine and confined to the bed until the last day or two, when he was placed in a wheel chair. That during a considerable portion of the time he was in great pain, and much of the time he was delirious. It further shows that he was cut off completely from the outside world, and saw only the nurses and doctors. No letters could go out without special permission. On one occasion his brother was permitted to enter the room where he was, and remain five minutes, but before doing so was required to don an oilcloth robe, and just before leaving the hospital his landlady came and talked with him through the window. Most of the time he was too weak to read or write. His testimony indicates that during the time his mind was more or less in a mental haze, as he could remember little that took place in connection with his case. We are of the opinion that the testimony discloses a state of facts which fully justified the board in making the finding which it did. If this state of facts would not furnish a basis for the finding that he was physically and mentally incapacitated within the meaning of the exception to the statute, it would be difficult to conceive a situation that would.

2. The statute involved provides that:

"No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity." Part 2, § 15.

In construing this section of the statute counsel apply some general rules which have been held applicable to statutes of limitations, namely, that the disability must exist at the time when the action accrues, and that, when the statute once attaches, the period will continue to run and will not be suspended by any subsequent disability unless the statute so provides. It is then argued that, because plaintiff was not incapacitated for several days after the accident, the statute has run, and the claim is barred.

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The rules stated by counsel are undoubtedly the rules which are usually invoked in construing general statutes of limitations, and they are precisely the rules which counsel would apply to this section were no saving clause attached. But the Legislature attached a saving clause, and they did it for some purpose. To construe the entire section as defendants have urged would make the saving clause of little force. It was the evident intent of the Legislature to give claimants six months in which to file their claims and to enlarge the time in the event they were either mentally or physically incapacitated during the six months.

If defendant's suggested construction should prevail, the practical operation of the statute would result in this:

(a) In case of immediate death the saving clause would apply.

(b) If death did not ensue until the following day, the saving clause would not apply, because the statute of limitations would then have begun to run.

(c) In case of injury, if the claimant became incapacitated on the date of the accident, the saving clause would apply.

(d) In case of injury, if the incapacity did not develop until the following day, the exception in the statute would not apply, because the statute of limitations would then be on its way.

It is easy to see that this is not the construction which the Legislature obviously intended the exception should have, nor is it a reasonable construction, if we keep in mind the purpose of the Legislature. The Legislature, of course, understood that in many cases of injury periods of incapacity would follow, and it is fair to presume that it annexed the saving clause to exclude such periods from the operation of the statute.

[2] Most of the cases bearing on this question of construction, including those cited by counsel, are cases construing statutes of limitation general in their application and wholly disconnected with the causes which produced the incapacity. The statute involved here is a short statute of limitation special in its application and having relation only to the legislation which it was created to serve. This statute of limitations is much shorter than the general statute which applies to personal injuries, and it ought not to be still further restricted by judicial construction if it can be reasonably avoided. The construction which should be given to the statute is that subsequent incapacity of the claimant within the six months' period will flag the statute. This is a reasonable construction, one that will make the saving clause mean something, and one which the Legislature evidently intended it should have. The board was right in its interpretation of the act, and their finding is affirmed, with costs to the plaintiff.

SUPREME COURT OF MICHIGAN.

SCHIMMEL

v.

DETROIT PRESSED STEEL CO. ET AL. (No. 63.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —AMOUNT OF COMPENSATION.

Notwithstanding Workmen's Compensation Act, pt. 2, § 10, providing that in no case shall the amount received for more than one finger

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exceed the amount provided in the schedule for the loss of a hand, one who could not work at his occupation by reason of the loss of several fingers and a severe laceration of all the tendons of the palm could obtain compensation beyond the limit of 150 weeks provided for the loss of a hand, where the disability continued beyond such time, although he could work at other occupations.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

Certiorari to Industrial Accident Board of Michigan.

Proceedings by Carl Schimmel under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Detroit Pressed Steel Company, the employer, and the American Mutual Liability Insurance Company, insurer. There was an award of compensation, and the employer and Insurance Company bring certiorari. Affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Payne & Payne, of Detroit, for claimant.

Charles H. Ruttle, of Detroit (Guy W. Moore and Hal P. Wilson, both of Detroit, of counsel), for respondents.

STONE, J. On October 3, 1917, the claimant, who was employed by the appellant Detroit Pressed Steel Company in the capacity of electrician, sustained an accidental, crushing injury to his left hand when said hand was run over by an electric traveling crane. The nature of the claimant's work was such as required him to work in elevated places, requiring him to maintain his balance by whatever means were near at hand while he carried on his work. He was engaged in placing conduits between certain buildings of said appellant, and was required for the time being to work near a crane runway. While working in that position, and with no other means of support, he grasped one rail of said crane runway, or allowed his left hand to rest thereon to steady himself. While in that position, an electric traveling crane proceeded along said runway without giving a warning, and upon and over his left hand, necessitating the amputation of the index finger, together with the third metacarpal bone thereof, a severe crushing and loss of the tendon—flexor tendon—of the second finger, and a severe laceration of all the tendons of the palm. After being totally disabled for over one month, claimant returned to work for said appellant, and was employed in an entirely different line of employment, namely, that of foreman in the tool crib. At the time of the accident his wage was 45 cents an hour, while at the time of the hearing before the Industrial Board a man in the same employment was paid from 85 cents to $1 an hour. Claimant's wage in the tool crib was 55 cents an hour. But it was his claim that he could no longer follow any part of his former employment, that of an electrician.

The effect of the accident upon claimant, at least so far as his former employment with this respondent is concerned, was clearly stated by Frederick May, chief electrician for the respondent on cross-examination:

"Q. If he had partial loss of the second finger and the palm of the hand there was injured, he couldn't grip? A. Of course, eventually I would find that out.

"Q. If you found that out would you put him back on that work? A. I wouldn't put him back, it is certainly true, after I found that out."

Claimant, among other things, testified as follows:

"Q. Now, was it necessary to use both hands? A. I could never have done the work I was doing with one hand.

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"Q. At any time would it be necessary to hold anything in position with one hand and tighten it up with a wrench or pliers in the other hand? A. I have had to work for half an hour or three-quarters of an hour at a time, and hang on with one hand and work with the other.

"Q. Here in this plant? A. Yes, sir. * * *

"Q. Have you ever tried to work at the occupation you were engaged in at the time of the accident? A. I have tried to use my hands in several lines.

"Q. In what lines? A. I mean in several branches of the electrical. I have tried to repair my wife's electric iron, which is the simplest thing in the world to repair, and I couldn't hold the small wires sufficiently tight enough with the left hand to skin it with the right hand. I can't handle the knife in my left hand at all."

A physician called by the claimant expressed the opinion that the claimant will not be able to use the injured hand in heavy work and heavy lifting. He testified as follows:

"Q. Would you say the hand was permanently injured? A. No; well, permanently injured in certain regards.

"Q. In what regard, Doctor? A. I don't believe with that scar over the nerve he will ever regain the proper function of that middle finger, I don't believe.

"Q. What would you say as to his capacity to grip? A. That is what I said before. I tested it several times, of course, and I formed the opinion that the function was just about 50 per cent. normal strength.

"Q. And in your opinion with anything that would require a strength of grip he would not be able to do it? A. I don't think so."

At first an agreement in regard to compensation was entered into by the terms of which said respondent agreed to pay applicant 35 weeks' compensation at $10 per week for the loss of the left index finger. This agreement was never approved by the Industrial Accident Board. Although payments were being made to claimant under this agreement, yet he filed notice of claim for injury, and on May 23, 1918, a committee of arbitration awarded claimant compensation for 35 weeks at $10 per week for loss of index finger, and, in addition thereto, $10 per week for disability subsequent to the 35-week period. Payments were continued by respondent and accepted by claimant during 34 weeks, but claimant refused to accept the payment for the thirty-fifth week or to sign a settlement receipt, claiming that because of the condition of his hand he was unable to perform the same duties as prior to the accident.

Respondent American Mutual Liability Insurance Company filed a petition with the board praying to be relieved from further liability under the award of the committee on arbitration, it appearing that applicant had returned to work for the respondent in charge of the tool crib at 55 cents per hour, plus a 10 per cent. bonus, and that he was able to perform his former duties, although he never actually attempted so to do.

Testimony was taken by the parties hereto, and after consideration by the Industrial Accident Board an order was entered December 24, 1918, denying respondent's petition, and ordering the payment of $10 per week for total disability subsequent to June 26, 1918, the date of the expiration of the 35-week period. It is this order of the Industrial Accident Board that this court, upon certiorari, is asked to review. That order continuing compensation reads as follows:

"A petition having been filed by the respondents in the above-entitled cause praying for reasons therein set forth that they be permitted to discontinue payments of the compensation in the case as of July 3, 1918, and the same having come on to be heard before the full board on November 20, 1918, and proofs having been filed and due consideration having been had thereon, the board finds as a fact from the entire files and

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testimony in the case that said applicant has been since the date of the accident, and was at the time his deposition was taken on November, 1918, totally incapacitated as an electrician, the employment in which he was engaged when injured, and is entitled to receive compensation in accordance with the award of the committee of arbitration, dated May 23, 1918, viz.: At the rate of $10 per week for a specific period of 35 weeks as for the loss of the index finger of applicant's left hand, and at the proper rate during any disability, whether total or partial, applicant may suffer, in his usual employment subsequent to the 35-week period mentioned, because of injuries to his left hand, apart from the amputated index finger.

"It is therefore ordered and adjudged that said applicant is entitled to receive and recover from said respondents compensation at the rate of $10 per week from the end of the period covered by the last payment thereof, June 26, 1918, up to and including the date of the taking of his deposition, November 18, 1918, in all $205, which amount shall be paid forthwith, and receipt filed with the Industrial Accident Board, it appearing from the files that one week's compensation, or $10, will complete the 35-week period mentioned herein, and the remainder of the $205 will be compensation as for total disability resulting from injuries to applicant's left hand apart from the amputated index finger.

"It is further ordered that from and after November 18, 1918, applicant is entitled to receive and recover from said respondents compensation at the rate of $10 per week during the period of his total disability in the employment in which he was engaged when injured; and should such disability become partial, then applicant shall be compensated at a rate equal to one-half the difference between the amount he was earning per week when injured and any lesser amount he may hereafter be able to earn in the same employment during the continuance of such partial disability."

Appellants state in their brief that the only question presented by the record arises out of the failure and refusal of the Industrial Accident Board in its order to properly limit compensation to the amount specified by the Workmen's Compensation Act (Acts Ex. Sess. 1912, No. 10) for the injuries applicant suffered, to wit, "the loss of the index finger of the left hand and an injury to the palmar surface of the same hand." Attention is called to the provision contained in section 10, pt. 2, of the Workmen's Compensation Act, which reads as follows:

"In no case shall the amount received for more than one finger, exceed the amount provided in this schedule for the loss of a hand."

It is the claim of appellants that under the authority of King v. Davidson, 195 Mich. 157, 161 N. W. 841, and Lovalo v. Michigan Stamping Co., 202 Mich. 85, 167 N. W. 904, the order of the Industrial Accident Board should be so modified as to limit respondents' liability to a period not exceeding 150 weeks as for the loss of a hand. We are unable to agree with counsel for the respondents in this contention.

An examination of King v. Davidson, supra, shows that the issue was whether in allowing compensation for the loss of three fingers the compensation should be limited to 20 weeks, being the longest period allowed for the loss of either of the fingers involved, or whether the period of payment should embrace the aggregate of 50 weeks, being determined by adding together the time allowed for the loss of each of the fingers involved. This court, being of the opinion that the loss of three fingers involved greater disability than the loss of one finger, allowed for the aggregate amount of 50 weeks. We think that case readily distinguished from the instant case.

Referring to the Lovalo Case, the Industrial Accident Board, in its return to the writ of certiorari herein, expressed its conclusion that that case was not applicable to the facts in the instant case, as in the latter only the index finger was amputated. It said:

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"The other injuries were caused by a crushing and burning of the fingers and hand and by the destruction of the tendons of some of the fingers. The board concluded that the Lovalo Case applied to amputations resulting from injuries, and not to a case where only one finger was amputated, and the remainder of the hand was injured or destroyed through crushing or burning or from a destruction of the tendons. The board, under the order made, left the case open so that the interested parties could come before the board from time to time if they found it necessary, and the board could then make such orders as the future might determine it was proper to make. The board knows of no theory upon which it would be justified in awarding the applicant compensation for 150 weeks as for the loss of his hand, and the board knows of no theory upon which it would be justified in holding that he might not be entitled to recover more than 150 weeks if the future shall determine that his incapacity lasts long enough to entitle him to compensation for more than that time."

An examination of the Lovalo Case shows that there the applicant was contending for compensation for 150 weeks, Justice Steere in the opinion stating:

"Appellee contends that he should receive compensation * * * for the loss of the entire hand, or that the Industrial Accident Board's order should be affirmed."

Here the claimant is asking that compensation shall continue during the period of disability as that disability shall from time to time appear. Claimant's position in this court is that the statute does not, under the specfic disability section, provide for the loss of use of a hand, except in so far as that loss of use tends to, or does actually, affect the ability of the injured servant to earn in the same employment in which he sustained his injury.

Attention is called by claimant's counsel to section 9, pt. 2, of the act, also to section 11, pt. 2, and to Foley v. D. U. R., 190 Mich. 507, 157 N. W. 45, and Jameson v. Walter S. Newhall Co., 200 Mich. 514, 166 N. W. 834, to the point that the test of disability lies in the capacity to earn in the same employment in which the employee was injured. Reference is also made to the language of this court in Jacobs v. Glasser & Hoffman, 200 Mich. 473-478, 166 N. W. 867, and Green v. Buick Motor Co., 201 Mich. 86, 166 N. W. 1028.

In the last-cited case the claimant, while operating a punch press, sustained an injury which so severely lacerated the third and fourth fingers of his left hand that it was necessary to amputate them. The second finger was also lacerated, but was not amputated. Subsequently claimant entered into a written agreement with respondent insurer in which it was stated as to the accident:

"While blanking gas tank support flanges one stuck in die, and while knocking same out punch came down and cut off third and fourth fingers of the left hand at second joint."

This agreement was approved by the Industrial Accident Board. Subsequently claimant regularly filed and served notice of claim for injury, which he stated as follows:

"The loss of the third and fourth fingers, also laceration of the second finger."

The claimant filed with the Industrial Accident Board a petition alleging that, in addition to the loss of the third and fourth fingers, he had partially lost the use of the second finger of his left hand, that he had been compensated for the loss of the third and fourth fingers, but that he had received no compensation for the injury to the second finger, and he therefore prayed that the case might be reopened and he be allowed further compensation. The board made an order granting said

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petition; and, after a hearing, it was decided that said claimant was entitled to compensation amounting to one-half the difference between his average weekly wages before the injury and the average weekly wages he was able to earn thereafter. This court found that there was evidence in the record to sustain the finding of the board, and also testimony showing that, if it had not been for the injury to the second finger, applicant could have done the work he had done previous to the injury, but was then unable to do so because of the injury to the second finger, and the decision of the board was affirmed by this court.

We are of the opinion that, under the authority of the cases cited, the claimant is entitled to compensation as granted by the Industrial Accident Board. As this court said in Limron v. Blair, 181 Mich. 76, 147 N. W. 546:

"The statute speaks in terms of disability. * * * When the period of disability ends, compensation ceases."

An examination of the record shows that there were ample facts before the board upon which to base its findings, and no error in the record appearing the order of the board is affirmed.

SUPREME COURT OF MINNESOTA.

STATE EX REL. RADISSON HOTEL ET AL.

v.

DISTRICT COURT OF HENNEPIN COUNTY. (No. 21384.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —INJURY IN COURSE OF EMPLOYMENT—DEFENSE—"ORPHAN."

The evidence sustains the finding that an employee of one of relators met death in the course of her employment from an accident arising out of it.

Children under 16 years are conclusively presumed dependents.

Where the employee accidentally killed is the mother of several children under 16 years of age, and the father had for several years prior to her death deserted the family, such children are to be regarded as "orphans," coming within subdivision 10, § 5, c. 209, Laws 1915 (Gen. St. Supp. 1917, § 8208), for the purpose of fixing the amount to be paid under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. §§ 388, 405[4].)

(For other definitions, see Words and Phrases, First and Second Series, Orphan.)

Appeal from District Court, Hennepin County; Horace D. Dickenson, Judge.

Certiorari by the State, on the relation of the Radisson Hotel, employer, and the Millers' Mutual Casualty Company, insurer, to review a judgment of the District Court of Hennepin County awarding compensation for the death of Vera Meakins, employee. Affirmed.

*Decision rendered, June 20, 1919. 172 N. W. Rep. 897. Syllabus by the Court.

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Asa G. Briggs and Charles H. Weyl, both of St. Paul, for relators.
Sasse & French, of Austin, for respondent.

HOLT, J. Certiorari to review a judgment in a proceeding under the Workmen's Compensation Act (Gen. St. 1913, c. 84a).

Vera Meakins was accidentally killed in Hotel Radisson, Minneapolis, shortly after 8 o'clock in the evening of November 3, 1918. She left surviving a husband and three minor children, the oldest being seven years of age. For several months prior to her death she had been in the employ of the Hotel Radisson Company, in charge of the passenger and freight elevators and the operators of the hotel. The court found that death resulted from an accident arising out of and in the course of her employment, and that the three minor children were her dependents, and, as conclusion of law, directed judgment to be entered in favor of the respondent, the guardian of the minors, for $11 per week for a period of 300 weeks and $100 for burial expenses. The findings mentioned and the conclusion of law are properly challenged in this court by relators, the Hotel Radisson Company and its insurer.

The deceased was receiving at the time of her death a stipulated wage, together with room and board in the hotel, amounting in all to $80 per month. She was the starter of the elevators, and usually performed that part at the entrance of the first floor, but at times directed this work from the top floor. She was also superintending the elevators in an annex adjoining the hotel, and it was her duty to observe and arrange for the hours of service of the various operators, and to examine and note whether the elevators and doors worked and closed properly. This required her at times to ride a good deal on the elevators.

The immediate circumstances surrounding the accident are these: Mrs. Meakins had attended as a starter during the day and had worn her starter's uniform, and appears to have "punched out" on the time clock at 7:50 p. m. on November 3. A few minutes after 8 she, in street attire, entered one of the elevators and rode up and down for some 15 minutes with the operator, talking to her. What they were talking about is not disclosed. As they were thus occupied, a passenger got off at the tenth floor, Mrs. Meakins followed, the operator closed the door, and was just starting to move the elevator up, when Mrs. Meakins pushed open the doors and attempted to re-enter. She tripped, the elevator was moving, and she fell back into the pit to her death.

Relators make much of the fact that deceased had "punched out" on the time clock and that she was dressed for the street; hence, it is said, the finding is not sustained that she met death in the course of her employment from an accident arising out of it. This overlooks some persuasive testimony given by the assistant manager of the employer, to the effect that deceased had no stated hours of work, but was practically on duty all the time, as he put it, "24 hours in the day"; that she used her own discretion as to the time within which she was to do that which was expected of her, that the wearing of the uniform was not obligatory for her, and that she was not required to punch the time clock, for her wages were not paid upon its record. The inference is near at hand that she was at the moment of the accident engaged in her work, endeavoring to ascertain whether the doors of the elevator she was riding on locked properly. It seems their defective condition in this respect was the direct cause of her death. We cannot say that the court's finding is not sustained under the rule announced in State ex rel. Niessen v. District Court, 172 N. W. 133.

The court held the children wholly dependent upon deceased. The fact was that the father of the children, the husband of the deceased, had deserted his family about 3 years before and had since contributed nothing to their support. The deceased and her children found a refuge with her father. She was ill for a time and unable to work. As soon

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as able she sought and obtained employment, the children in the meantime remaining with her father. She bought clothes for them and otherwise contributed to their support. At the time of the accident the children's father was in the army. Under the regulations of the military service, being married, he had been compelled to authorize the government to turn over a portion of his pay for the support of his family. No part thereof had been received up to the time of the trial. We need not determine whether the evidence justifies a finding that the children were in fact wholly dependents, for section 8208(1), G. S. 1913, as amended by section 5, chap. 209, Laws 1915 (Gen. St. Supp. 1917, § 8208), provides that minor children under the age of 16 years shall be conclusively presumed to be wholly dependent. The minor children thus referred to are the children of an employee accidentally killed in the course of the employment. The law does not in terms exclude the children of the female employee, and no good reason occurs to us why they should be excluded by construction. That dependents of female employees are intended to be protected by the act is clear, for a dependent husband is specifically provided for in subdivision 11 of said section 5.

The learned trial court evidently regarded the children as coming within subdivision 10 of the section just referred to, which reads:

"If the deceased employee leave a dependent orphan, there shall be paid forty per centum of the monthly wages of deceased, with ten per cent. additional for each additional orphan with a maximum of sixty per centum of such wages."

A woman may have obtained a divorce and have been awarded the care and custody of the children on the ground of the husband's misdeeds, and his situation may be such that there is no hope of ever compelling him to contribute to the support of his children, or he may have deserted his family, as in this case. Is this statute to be so construed that if the mother, thus left, in an effort to earn a living for herself and children, is accidentally killed while working in an employment where the Workmen's Compensation Act applies, the children should fare worse than would be the case had their father been killed under the same circumstances and the mother had previously voluntarily without cause deserted him and the children? In the latter case the widow could get no part, and there would be no difficulty at all in holding that a fatherless child is an orphan, even though its mother is living.

An important case involving a large bequest under Girard's will is Soohan v. City of Philadelphia, 33 Pa. 9. The case limited the provision for "orphans" in the will to fatherless children. The opinion shows great research. Some stress is there laid upon Girard's French descent and the meaning of the word "orphan" in that language; also upon the construction the trustees of the institution, founded under this provision, had placed upon the meaning of the word, and according to which the institution had been conducted for many years. In the course of the opinion it is stated that in a friendly controversy concerning the meaning of the word between John Quincy Adams and Judge Hopkinson in 1833, the former maintained that the word "orphan" includes those children who had lost both or either parent, while the latter held that the term was to be confined to those who had lost their father only. It is also stated that there was the same uncertainty of meaning in the then published dictionaries. "An orphan, in legal parlance, is a fatherless child." Poston v. Young, 7 J. J. Marsh, (Ky.) 501. Stewart v. Morrison, 38 Miss. 419, placed the same construction upon the word. However, this was held too narrow in the subsequent case of Hall v. Wells, 54 Miss. 289. But there can be no doubt that a fatherless child may be classified properly as an orphan. May it also mean a motherless child? In Friesner v. Symonds, 46 N. J. Eq. 527, 20 Atl, 259, it is said:

"An orphan is a minor who has lost one or both of his parents. This is the definition given by both Bouvier and Webster. But, according

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to the rule prevailing in this state, it would seem that a minor is not an orphan unless his father is dead."

The court in Heiss v. Murphey, 40 Wis. 276, on page 291, says:

"The word 'orphan' includes a minor who has lost both of his or her parents, or one who has lost only one."

Black defines an orphan as:

"Any person (but particularly a minor or infant) who has lost both (or one) of his or her parents."

Bouvier:

"A minor or infant who has lost both of his or her parents. Sometimes the term is applied to a person who has lost only one of his or her parents."

Webster:

"A child bereaved by death of both father and mother, or, less commonly, of either parent."

The Century:

"A child bereaved of one parent or of both parents, generally the latter."

The decisions, as well as the dictionaries, recognizing that the term "orphan" may properly be applied to a motherless as well as to a fatherless child, we think it meets with no difficulty of construction to hold that the minors here in question are orphans within the meaning of subdivision 10 of section 5, chapter 209, Laws 1915. They have been deserted by their father and bereft by death of their mother, the only parent who for the last 3 years made any attempt to support them. The original idea of designating fatherless children orphans, the same as those who had lost both parents, seems to be that the father was the head of the household and responsible for the care and support of the minors therein. When the father has abdicated that place and deserted the family, the children become indeed orphans when also bereft of their mother. The purpose of the Workmen's Compensation law is to provide for the dependents of the employee who accidentally meets with death in the employment. To accomplish the beneficent purpose intended, the law should be given a broad rather than a narrow construction.

The judgment is affirmed.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

JENSEN

v.

F. W. WOOLWORTH CO. (No. 90.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COMMUTATION OF AWARD—"UNUSUAL CIRCUMSTANCES."

That a petitioner for commutation of an award under Workmen's Compensation Act, who had accidentally swallowed pins while trimming

*Decision rendered, Feb. 6, 1919. Amplified Opinion, March 3, 1919. 106 Atl. Rep. 808.

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a show window, was thereby rendered helpless and bedridden, and that a surgical operation was necessary to save her life because of a pin near the base of the brain, was an "unusual circumstance," warranting commutation of future weekly payments into a lump sum, within Act April 4, 1911 (P. L. p. 143) § 2, par. 21, as amended by Act April 1, 1913 (P. L. p 309) § 6.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW—QUESTIONS OF FACT.

On appeal in a workmen's compensation case from a judgment of the court of common pleas commuting an award to a lump sum, the findings of fact in the common pleas are conclusive, if there be any evidence to support them.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COMMUTATION OF AWARD—STATUTES.

That the concluding provision of Act April 4, 1911 (P. L. p. 143) § 2, par. 21, as amended by Act April 1, 1913 (P. L p. 309), § 6, relating to Workmen's Compensation, provides that commutation of an award shall not be allowed for the purpose of enabling the injured employee to satisfy a debt or to make payment to physicians, lawyers, or any other persons, does not defeat commutation, where unusual circumstances exist, requiring payment to physician to save the employee's life.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from Supreme Court.

Proceeding under the Workmen's Compensation Act by Tressa M. Jensen against the F. W. Woolworth Company. From a judgment of the Supreme Court upon certiorari, affirming the judgment of the Morris county court of common pleas commuting an award for plaintiff to a lesser sum, defendant appeals Affirmed.

In the Supreme Court the following per curiam was filed:

"The certiorari in this case was allowed to review the determination of the Morris county court of common pleas commuting a judgment under the Workmen's Compensation Act from $1,410, payable in installments. at $5 per week, to $1,247.25, in addition to $590 already accrued and $50 allowed for medical and hospital services and medicines. The petitioner was injured on May 21, 1915, while in the employ of the defendant, accidentally swallowing pins, while assisting in trimming a show window, on May 21, 1915.

"The rule to be followed by the courts for commutation of compensation is laid down by the Legislature in P. L. 1913, p. 309. The order of commutation was made in accordance with the provisions of the statute, and there was sufficient evidence before the court to support the order under review. These are the two points argued in the prosecutor's brief

"The judgment of the Morris county court of common pleas is affirmed, with costs.

M. Casewell Heine, of Newark, for appellant.
Benjamin F. Jones, of Newark, for respondent.

PER CURIAM. The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court. More amplified views will be set forth in an opinion to be filed.

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Amplified Opinion.

This case came up on certiorari to the Supreme Court to review the judgment, order, and proceedings of the Morris county court of common pleas upon a petition praying for commutation of an award of compensation granted to petitioner under the Workmen's Compensation Act. Petitioner's injury resulted from the accidental swallowing of pins on March 21, 1915, while in the employ of respondent.

The court of common pleas of Morris county determined in the compensation proceedings that petitioner suffered a disability total in character and permanent in quality, and decreed compensation payable at the rate of $5 a week for not more than 400 weeks. On September 21, 1917, petitioner filed a verified petition, praying for commutation into a lump sum payment of balance of compensation by respondent to petitioner.

The court thereupon, after hearing the testimony of Dr. James F. Horn, on behalf of the petitioner, filed findings of fact and an order commuting into a lump sum payment the balance due under the original award. The Supreme Court affirmed this order of the court, and from this order and judgment an appeal is taken to this court.

WALKER, Ch. The appellant makes four points on this appeal, and argues them under two heads, namely: (1) That the order commuting the award of compensation is contrary to the provisions of the statute (P. L. 1911, p. 134, § 2, par. 21, amended P. L. 1913, p. 302, § 6); and (2) that there is no evidence to support the finding of the common pleas upon which commutation was based.

The Supreme Court in a per curiam remarked that the order of commutation was made in accordance with the provisions of the statute, and that there was sufficient evidence before the court to support the order reviewed, and affirmed the judgment of the Morris pleas. Dr. Horn, who gave evidence for the petitioner on this application, testified that she was in bed in a helpless condition, and has required the constant attention of nurses; there is a pin near the base of her brain, and that in his opinion an operation will have to be performed to save her life; she is in need of constant care and attention, and unless she receives the same her life cannot be saved.

[1, 2] The statute provides, among other things, that, as commutation is a departure from the normal method of payment, it is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. If to be bedridden, with the requirement of a surgical operation to save the patient's life, is not an unusual circumstance, and such an one as warrants commutation of future weekly payments into a lump sum, to enable the patient to procure the services of a surgeon and the proper medical attention and nursing, it is hard to conceive of circumstances that would call for the making of an order for commutation. It is plain, therefore, that there was sufficient evidence before the Morris pleas to support the order, as was said by the Supreme Court, and it is familiar doctrine that on appeal in these cases the findings of fact in the common pleas are conclusive, if there be any evidence to support them. Sexton v. Newark Dist. Tel. Co., 84 N. J. Law, 85, 86 Atl. 451; Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. That Dr. Horn's testimony was at least some evidence to support the finding of the pleas is too plain for argument.

The only other contention is that the order commuting the award is contrary to the provisions of the statute. So much of the section (P. L. 1911, p. 134, § 2, par. 21, amended P. L. 1913, p. 302, § 6) as applies, reads as follows:

"The compensation herein provided may be commuted by said court of common pleas, * * * if it appear that such commutation will be for the best interest of the employee * * * or that it will avoid undue expense or undue hardship to either party. * * * In determining whether the commutation asked for will be for the best interest of the employee,

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* * * or that it will avoid undue expense or undue hardship to either party, the judge of the court of common pleas will constantly bear in mind that it is the intention of this act that the compensation payments are in lieu of wages, and are to be received by the injured employee * * * in the same manner in which wages are ordinarily paid. Therefore commutation is a departure from the normal method of payment, and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. Commutation shall not be allowed for the purpose of enabling the injured employee * * * to satisfy a debt, or to make payment to physicians, lawyers, or any other persons."

Many, if not all, of the statutes have statutory provisions for the commutation of weekly payments into gross sums; but we have pointed to none, nor have we found any, which is similar to ours, nor has ours been construed with reference to any given circumstances making a case falling within its provisions. We are therefore confronted in the case at bar with a question of novel impression.

Going now to the letter and spirit of section 6 of the act of 1913, amending section 2, par. 21, of the act of 1911, we find that the court may order commutation if it appear that it will be for the best interest of the employee. Surely it will be for the best interest of Miss Jensen to be placed in funds which it appears may save her life, rather than that she be compelled to take the chance of almost certain death without them. Then, too, commutation may be made to prevent undue hardship. The same reasoning applies.

Bearing in mind that it is the intention of the act that compensation payments are in lieu of wages, and are to be received by the injured employee in the same manner in which wages are ordinarily paid, that is, in installments, and while commutation is a departure from the normal method of payment, to be allowed only when it clearly appears that some unusual circumstances are present in the case sub judice, namely, that the life of the employee appears to be at stake, and that, at least in all probability, it can only be saved by a surgical operation, by the attendance of a physician, by nursing, and by medicines, all of which will require the expenditure of moneys, which the patient does not possess and cannot raise.

[3] Commutation in these circumstances is not to be defeated by the concluding provision of the statute that it shall not be made to enable the employee to satisfy a debt, or to make payment to physicians, lawyers, or other persons. Of course, if the exception ended with the clause that commutation shall not be made to enable the party to pay a debt, it would be too plain for argument that no order could be made to enable an employee to discharge a sum already due and payable, and, when it goes on to provide that it shall not be made to enable payment to physicians, lawyers, or other persons, it might seem at first blush to prohibit the very thing sought to be accomplished here, namely, to enable this unfortunate woman to secure the essentials to save her life. And such a construction may seem plausible, because the prohibition against paying debts—that is, past-due obligations—is followed disjunctively, "or to make payment to physicians," etc.; for, if a physician's bill had been already incurred, it would be comprehended under the term "debt" and there would be no reason for the further provision prohibiting payment to physicians. A literal construction, therefore, of this last provision, would nullify the earlier provisions of the section, and deny the suffering employees the evidently intended benefits provided for in the section. If commutation could not be made to enable payment to any person for anything, it manifestly could not be made at all. This inhibition against commutation for payment to physicians, lawyers, or other persons is evidently meant to protect the employee in the enjoyment of the periodical payments, by making it impossible

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for him to yield to importunities of creditors for the discharge of their already due obligations, or to raise money to be spent in enterprises of a doubtful or hazardous nature, or where it does not appear that commutation will otherwise be for the best interest of the employee, or is not needed to avoid undue expense or hardship, or when it does not appear that some unusual circumstances warrant a departure from the normal method of periodical payments.

Let it be borne in mind that the statute empowers the court to commute the compensation in certain circumstances, and then provides that it shall not be allowed in order to make a payment to any person. If no payment for anything to any person could be made, for what could the lump sum be used? For nothing. If commutation be ordered, it would certainly be for the purpose of use by the person to whom it was awarded, and it could not be used by any such person without passing it on to others. If effect is to be given to the provision that commutation may be made, effect cannot be given to the provision that it shall not be made to enable payment by the employee to anybody, without compelling the recipient to hoard it, or give it away, things too absurd for serious mention.

[4, 5] The rules of construction prevent any of the words of this section from defeating the obvious intent of the Legislature. In construing a statute, where literal interpretation may lead to absurd results, resort may be had to the principle that the spirit of the law controls the letter. Mendles v. Danish, 74 N. J. Law, 333, 65 Atl. 888. The intended benefits to be derived by an injured employee from commutation of periodical payments into a lump sum, in proper circumstances, is not to be defeated by the provision that commutation shall not be allowed to make payment to physicians, lawyers, or other persons—not if unusual circumstances call for payments to any of them. If, however, the provision last mentioned is so plain as not to admit of construction which will harmonize it with the other provisions of the section, then it is void; for where a saving clause, if good, would render a statute of no effect or operation, the saving clause is void; a saving totally repugnant to the body of an act is void. 1 Bl. Com. 89.

Either upon a liberal construction of the provision in question, or by treating it as inoperative, the petitioner is entitled to prevail. In our opinion the Supreme Court reached the right result in this case, and its judgment should be affirmed, for the reasons above expressed.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

SIMPSON

v.

NEW JERSEY STONE & TILE CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"TOTAL AND PERMANENT DISABILITY."

Where an employee's arm is so seriously fractured that it creates a total disability, which will be permanent unless the arm be amputated, award under the Workmen's Compensation Act (Laws 1911,

*Decision rendered, May 15, 1919. 107 Atl. Rep. 36.

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p. 134, as amended by Laws 1913, p. 309) is not limited to that for the loss of an arm, since a "total and permanent disability" may exist without loss or injury to any specific member.

(For other cases, see Master and Servant, Dec Dig. § 385[18].)

(For other definitions, see Words and Phrases, Second Series, Totally and Permanently Disabled.)

The Chancellor and Williams and Taylor, JJ., dissenting.

Appeal from Supreme Court.

Proceedings under the Workmen's Compensation Act by William Simpson, opposed by the New Jersey Stone & Tile Company, employer. Judgment for petitioner, and employer appeals. Affirmed.

On appeal from the Supreme Court in which the following per curiam was filed:

"This is a workman's compensation case, and the main point raised relates to the finding by the trial court of total and permanent disability.

"The original injury was a very bad fracture of the arm, which was compound, and became infected and discharged pus for a long period. Amputation was seriously considered, but the arm was saved. There was, however, a poor recovery, and the patient had several abscesses, and at the t[illegible] of the hearing was suffering, as the court found, with a severe neuritis caused perhaps by minor nerves being involved with the callous of the fracture, which, in the opinion of his physician, made him totally unfit for work, and there was evidence to support the finding that this condition would continue indefinitely unless the arm were amputated.

"Prosecutor's claim is that the award cannot exceed that authorized for the loss of an arm, but to this we do not agree. Cases are readily conceivable in which total and permanent disability exists without the loss of or injury to any specific member. If the physical conditions in the present case as the court found them to exist at the time of the hearing created a total disability which was permanent unless the arm were amputated (and we think the evidence justified a finding of such a condition), the case of Feldman v. Braunstein, 87 N. J. Law, 20, 93 Atl. 679, controls. Petitioner is not required to undergo a serious operation such as amputation of the arm at the shoulder. The court therefore properly dealt with the condition as actually existent.

"Another point is made: That the order permits review within one year, whereas the act says review may be had after one year. This looks like a mere slip of the pen. The conclusions of the judge properly follow the statute, but the judgment does not. If necessary, the case may be remanded for correction of the judgment, which is merely an amendment to conform to the statute and the court's conclusions. In other respects the award is affirmed."

Clarence L. Cole, of Atlantic City, for appellant.

William E. Holmwood, of Newark, for respondent.

Per Curiam. The judgment under review will be affirmed for the reasons set forth in the opinion of the Supreme Court.

The Chancellor and Williams and Taylor JJ., dissent.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BONNANO ET UX.

v.

METZ BROS. CO. ET AL.*

1. MASTER AND SERVANT—DEPENDENCY—EVIDENCE.

Evidence *held* insufficient to show that a deceased employee's parents living in a foreign country were dependent upon him, within Workmen's Compensation Law; there being nothing to show that his brother and sister, who asserted that he sent money to his family, knew any of the facts, and no corroborating circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DEPENDENCY.

In the matter of dependency, it is necessary to establish by competent evidence that claimants stood in that relation to decedent.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

3. EVIDENCE—RECORDATION OF BIRTHS—CERTIFIED COPY.

Statement of "officer in charge" as to birth of decedent and claim of dependency by alleged parents is not competent evidence of the existence of decedent's parents; a certified copy of the record being essential, in view of Code Civ. Proc. §§ 956, 957.

(For other cases, see Evidence, Dec. Dig. § 158 [15].)

Appeal from State Industrial Commission.

Claim by Antonino Bonnano and wife for compensation under the Workmen's Compensation Law for death of Vincenzo Bonnano, opposed by the Metz Bros. Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Award reversed, and proceeding remitted.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Alfred W. Andrews, of New York City (John N. Carlisle, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. On the 6th day of February, 1917, Vincenzo Bonnano, while in the employ of Metz Bros. Company, Buffalo, received injuries from which death resulted. The only question on this appeal is whether the father and mother of the decedent, living in Italy, were dependent upon him at the time of his death.

[1] There is no evidence in the record that the father and mother are living. There is a certificate, signed by "J. Parini, Officer in Charge," that "on the 21st day of January, 1859, Bonnano Antonino,

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 51.

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son of Salvatore and of Schifano Giodanna, was born at Roccapalumba, as it is shown in the record of birth registered in the Bureau of Vital Statistics," and a similar certificate is made of the birth of a female, who is supposed to be the mother of the decedent, as the former is assumed to be the father of the decedent, and a like certificate of the birth to these two of a son by the name of the decedent in 1902, and the claim of dependency upon this child, who was born on the 10th of January, 1902, and was killed on the 6th of February, 1917, when he was approximately 15 years and 1 month of age, is crowding the Workmen's Compensation Law (Consol. Laws, c. 67) about to the limit.

There is no evidence that this child of 15 years of age had "supported, either in whole or in part, for the period of one year prior to the date of the accident," either the father or the mother; the general allegation of a brother and sister that "when my brother Vincenzo died in consequence of an accident received in Buffalo, N. Y., on the 6th day of February, 1917, was alive, periodically sent money to his family for support, they being in straitened circumstances," not amounting to such evidence. There is nothing to show that this brother and sister knew of any of the facts which they assert; there is no date fixed, and no amount is stated to have been sent at any time within the limits fixed by section 17 of the Workmen's Compensation Law.

[2, 3] In Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 328, 120 N. E. 735, the court held squarely that hearsay evidence, without any corroboration by facts, circumstances, or other evidence, was not sufficient to sustain an award, where the question was as to the injuries; and we are of the opinion that in the matter of dependency it is necessary to establish by competent evidence that the claimants stood in that relation to the decedent. Here we do not have any competent evidence of the existence of the parents of the deceased; the statement of "J. Parini, officer in charge," that the Bureau of Vital Statistics in a town or village in Italy shows certain facts, is not competent evidence of the fact; we should have a certified copy of the record. Code of Civil Procedure, §§ 956, 957. The statute requires competent evidence, not difficult to procure if the facts exist, that the deceased has "supported, either wholly or in part, for the period of one year prior to the date of the accident," the person making the claim under the provisions of section 17 of the Workmen's Compensation Law, and anything less than this cannot be accepted as "just as good." If this child of 15 years of age, working in America, has been supporting his parents for one year before his death, either wholly or in part, it is no hardship to have that fact proved in the manner required by law. This record does not disclose these facts, and the award ought not to stand.

The award should be reversed, and the proceeding remitted to the State Industrial Commission. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

FOLTS

v.

ROBERTSON ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

In proceedings involving issue of whether the remote cause of employee's death from lobar pneumonia and traumatic gangrene of the lungs was an injury from lifting, evidence *held* to sustain award, in view of presumption under Workmen's Compensation Law, § 21.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF DEATH.

Where employer received immediate notice of accident, kept in constant touch with employee during his last sickness, had actual notice of employee's death upon day thereof, shortly thereafter discussed compensation with widow, and an autopsy would not have shown cause of death, failure to give notice of death was not prejudicial.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF DEATH—INSURANCE CARRIER.

Notice to or knowledge of employer as of employee's death is notice to and knowledge of the insurance carrier.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Law by Barbara B. Folts for compensation for herself and minor children for death of her husband, Daniel M. Folts, opposed by William S. Robertson, employer, and the Ætna Life Insurance Company, insurance carrier. Award by the State Industrial Commission for claimant, and the employer and insurance carrier appeal. Affirmed.

Argued before John B. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

William H. Foster, of Syracuse, for appellants.

Charles D Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

McKelvey & Stenacher, of Saratoga Springs (George H. Stenacher, of Saratoga Springs, of counsel), for claimant.

LYON, J. Daniel N. Folts suffered injury March 7, 1917, and died April 18, 1917. He was employed as the driver of a lumber sleigh. His claim, made April 13th, stated his injuries as follows:

"How did the accident happen? I was lifting the rear end of sleigh I was drawing lumber on. Runners stuck and suddenly gave way,

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 34.

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throwing me off my balance and causing me to fall to my knees with weight of sleigh on me.

"State fully nature of injury. My left side was hurt above the hip, so that I could not lift left arm or use left shoulder, and I could not breathe freely or without severe pain in that side."

The defendant claims that it is not liable to make compensation to the claimants under the principles of law laid down in Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735, and Tucillo v. Ward Baking Co., 180 App. Div. 302, 167 N. E. 666, upon the ground there is no competent evidence that the deceased received an accidental injury in the course of his employment.

There was no external sign of injury. Whether or not there was tenderness to touch is uncertain. Dr. Varney, who was the attending physician, stated June 8, 1917, "Tenderness to touch not present," and in his testimony on August 11, 1917, he says the statement was signed with full knowledge of facts in the case and is true. In the preceding attending physician's report of date May 5, 1917, he says in answer to the question:

"Give an accurate description of the nature of the accident and of the injury. Nothing to be seen; examination reveals tenderness lower part of lung on left side; developed pneumonia, lobar gangrene of lung."

In order to get an understanding of the case, it will be necessary to review the facts in detail. Upon the day of the accident Folts notified the employer of the nature of the injury. He also told a fellow employee at the time. Upon going home, he complained that he had strained his side in lifting the sleigh. He was unable to lift a weight with his left arm. He bathed his side with liniment. On the following day, Thursday, he went to work. On Friday he was obliged to stop work before noon. His wife put a mustard paste on. On Saturday, which was a busy day, he took his oldest boy and went to work. On the following day, Sunday, he was in bed. On Monday he was unable to work. On Tuesday, the 13th, he called the family physician. The doctor found him suffering from tenderness of the lower part of the left lung. He placed adhesive strips upon him, and left him cough medicine. In answer to the question:

"When did he tell you anything about this injury? You went to him March 13th, strapped him up and told him to go to bed? He must have told me the same day, or I would not have strapped him up."

His temperature was 101 or 102 degrees. He sat bolstered up in a chair supported by a pillow. Dr. Varney saw him again March 17th. His cough kept growing worse and pneumonia developed. Counsel was called in, and he appeared better until about April 14th. He was apparently improving, when he was suddenly taken worse and died on April 18th. The doctor diagnosed his ailment as:

"Pleurisy, followed with lobar pneumonia, and traumatic gangrene of the lungs."

The claim is resisted mainly upon two grounds: The first is the failure of proof of an accident arising out of and in the course of employment; and, secondly, that the employer and insurance carrier were prejudiced by the failure to give notice of the accident and to give notice of death.

In Carroll v. Knickerbocker Ice Co., supra, there was introduced the testimony of persons who were present at the time the accident was claimed to have been received, who testified that no cake of ice slipped and struck the decedent. Thus the presumption created by section 21, Workmen's Compensation Act (Consol. Laws, c. 67), was

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overcome by substantial evidence. In this case there was no such contradictory testimony. In Belcher v. Carthage Machine Co., supra, it was held that an award could not be sustained, founded upon hearsay evidence, where there were contradictory statements made by the deceased, and other proof inconsistent with the claim. In Tucillo v. Ward Baking Co., supra, it was held that the evidence failed to support the finding as to the cause of death, and that all the evidence negatived it.

[1] On April 13th, five days before his death, the deceased verified the disability claim later filed with the commission. That he was suffering from the strain is apparent. Dr. Varney says the pleura was injured, the covering to the lungs, and that the lung broke down en masse; that the remote cause of death was the injury to his side, and that the immediate cause of death was lobar pneumonia and traumatic gangrene of the lungs. The following question was asked Dr. Varney and the following answer given:

"Are symptoms from which he is suffering due entirely to this injury? Yes."

At the hearing, held August 11, 1917, he testified in answer to the question:

"Would you in any way from a medical standpoint be able to connect up the strain, if such a strain happened on March 7th, with traumatic gangrene of the lungs? Yes.

"When you say traumatic gangrene, do you mean the pleura? It was due to the original injury."

Dr. McKenna gave it as his opinion that Folts may have died as the result of the injury:

"The pleura, of course, is in intimate contact with the outer portion of the lung surface. An injury causing an inflammation, thereby lowering the vitality of the individual sustaining the trouble, the trouble might readily destroy the lung tissue, and these germs could go ahead and do their part. * * * I said, if the hypothesis was true, then the injury was the determining cause of the disease which brought on this man's death."

Dr. Lewy, the chief medical examiner of the commission, said:

"Although I am not of the opinion that the pneumonia and ultimate gangrene of the lung was caused by the injury, I can readily understand, and call the attention of the commission, that if the strain can be proven to the satisfaction of the commission by the description of the alleged accident, namely, the lifting of sleigh, and considering the reduced resisting power in consequence of age, possibly a previous existing pulmonic condition, then the injury could have been a contributing factor in markedly reducing his vitality and lowered his resisting power, and therefore claimant ultimately died of the complications which followed the traumatic pleurisy."

I think the award in this case was amply corroborated by facts, circumstances, and evidence other than the declarations of the deceased, and no substantial evidence was offered to overcome the presumption created by section 21.

[2, 3] Were the employer and insurance carrier prejudiced by the failure of the widow to give notice of the death? As we have seen, immediate notice was given of the accident. The employer was in constant touch with deceased during the whole of his last sickness. Days when he did not call in person he used the telephone and also talked with the doctor. The employer had notice the day he died. The son saw him. The employer testified:

"Went to see him two or three days after he died. Shortly afterwards I saw the widow and children. They spoke of compensation."

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In answer to the question:

"You don't claim, Mr. Robertson, that any lack of notice of this injury has been prejudicial to you? No."

In fact, it could not have been prejudicial to either the employer or insurance carrier. Notice to or knowledge of the employer is notice to and knowledge of the carrier. Dr. McKenna testified that in his opinion an autopsy would not have shown whether the man died as the result of a strain. An autopsy might not show anything. Probably at the time the autopsy would be absolutely negative. Not only that, but the employer's first report of injury is signed May 7, 1917, which was within 20 days of the employee's death. Mrs. Folts was ill immediately following his death. The award was made, but was rescinded April 2, 1918. Additional testimony was taken on January 29, 1919, and the award appealed from was made. An opinion was written by Commissioner Sayer, which was adopted as the opinion of the commission.

The award should be affirmed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

KLEIN ET AL.

v.

BROOKLYN HEIGHTS R. CO.*

MASTER AND SERVANT—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—AWARD—DEPENDENTS.

A father, contributing $12 per week to a common fund of $30 for family maintenance, *held* not dependent on a deceased son, who contributed only $12 of the fund, the remainder being contributed by a brother, and hence an award to the father would be a duplication of the award to the dependent mother and sister of deceased.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Annie Klein and others for an award under the Workmen's Compensation Act against the Brooklyn Heights Railroad Company, employer. From an award of the State Industrial Commission, made to the father, mother, and dependent sister of the deceased employee, the employer appeals. Award reversed, and matter remitted to the commission for action in accordance with opinion.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 67.

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George D. Yeomans, of Brooklyn (Trabue Carswell, of Brooklyn, of counsel), for appellant.

Charles D Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. This is an appeal from an award to the father, mother, and infant sister of a deceased employee. The award to the father is disputed on the ground that he was not a dependent. The deceased earned $18 a week, reserved for spending $4 or $5, gave his infant sister $2 or $3, and paid the balance of about $12 to his mother, who bought his clothes and used the remainder for general family purposes. The father earned $12 a week, which he paid to the mother, while a brother, who earned $8 a week, paid her $6 for the family fund. The mother and sister were not wage-earners. There were two other members of the family, but they need not be considered, for they were self-supporting, and did not contribute to the family maintenance. For the support of a family of five, therefore, there was a common fund of $30, to which the deceased contributed $12, the father $12, and the brother $6.

If the fund was distributed equally to the needs of the five, so that each received the benefit of an expenditure of $6, then the brother expended just what he paid in, the deceased and his father each providing $6 more than he expended, and the mother and sister were the sole beneficiaries of the excess payments. It is therefore difficult to see wherein the father could have been dependent upon his son. The aid of the son lightened the burden of the father, but such aid made the mother and sister, not the father, the dependents of the deceased. For the loss of such aid the mother and sister have received awards, and for the same loss the father cannot also be paid, without duplication of compensation. It is clear that, unless the father expended more than the $12 which he paid, he received no benefit from the contributions of his son. As no such expenditure was proven, the father was not a dependent of the deceased employee, and should not have had an award.

The award is reversed, and the matter remitted to the commission, for action in accordance with this opinion. All concur, except John M. Kellogg, P. J., who dissents.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

RICHARDSON

v.

GREENBURG.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ACCIDENTAL INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

The contraction of glanders through inhalation of the bacteria of glanders, resulting in death of a stableman, was not an "accidental

*Decision rendered, May 19, 1919. 176 N. Y. Supp. 651.

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injury arising out of and in the course of the employment," within Workmen's Compensation Law, § 3, subd. 7, and section 10.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal and Questions Certified from State Industrial Commission.

Proceedings by Louise Richardson for compensation under the Workmen's Compensation Law for the death of her son, Elmer Richardson, opposed by Harry Greenburg, employer. From an award of the State Industrial Commission, the employer appeals, and the Commission certifies a question. Question answered in negative, award denied, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

David Batt, of New York City, for employer.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. [1] The State Industrial Commission has certified to this court the following question:

"Was the contraction of glanders, under the circumstances as found by the commission, which resulted in the death of Elmer Richardson, an accidental injury arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Law?"

The findings made by the commission are substantially to this effect: That Elmer Richardson was employed as a stableman by Harry Greenburg; that while so employed he was required to lead a horse affected with glanders through the streets of the city of New York; that during his journey he contracted glanders; that the disease was contracted through inhalation of the bacteria of glanders; that he died from the disease of glanders 14 days thereafter; that his death was due to an accidental injury arising out of and in the course of his employment. The commission also made an award to a dependent mother and son, from which award an appeal has been taken.

Compensation is payable by an employer only "for the disability or death of his employee resulting from an accidental personal injury." Workmen's Compensation Law (Consol. Laws, c. 67) § 10. Of such an injury the definition is given:

"'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." Workmen's Compensation Law, § 3, subd. 7.

Had it been the intention of the Legislature to include within the meaning of "injury," or "personal injury," all diseases of whatever nature, it would not have been necessary expressly to mention, in addition to "accidental injuries," "such disease or infection as may naturally and unavoidably result therefrom." This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must "result" from "accidental injury"—that is to say, it must be preceded by such injury, and therefore cannot constitute the injury which it follows. Evidently "disease" and "accidental injury" are in contrast with each other, so that the former is never comprehended by the latter. The Workmen's Compensation Law was drawn with painstaking care, and it cannot

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be supposed that words and phrases found therein, particularly in the defining clauses, were needlessly, meaninglessly, or obscurely used. The plain meaning of its words, without the aid of judicial interpretation, induces the conclusion that the Legislature intended to make compensable no condition or death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of a disease.

The construction suggested would accord with the interpretation given by decisions to the phrase "accidental injury," as employed in policies of insurance against accident, and permit awards only where recovery would be permitted under such policies. Thus it was held in Bacon v. U. S. M. A. Ass'n, 123 N. Y. 304, 25 N. E. 399, 9 L R. A. 617, 20 Am. St. Rep. 748, that death due to malignant postule, commonly called anthrax, caused by anthrax bacteria entering the pores of the skin at points where there were no abrasions, resulted from disease, and not from accidental injury. On the other hand, we find that diseases naturally resulting from traumatic injuries have been held to be accidental injuries. Thus in Bailey v. Interstate Casualty Co., 8 App. Div. 127, 40 N. Y. Supp. 513, blood poisoning arising from the injection of an infected hypodermic needle into the flesh to a depth not intended was held to be an accidental injury. In Lewis v. Ocean Accident & G. Corp., 224 N. Y. 18, 120 N. E. 56, death resulting from inflammation of the brain, in turn caused by bacteria entering the blood current through a punctured pimple, was held to be due to accidental injury. The court said:

"The punctured wound is an adequate cause. The evidence suggests no other."

There are no decisions under the Workmen's Compensation Law which are opposed to the construction of that law herein suggested. In Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. Supp. 767, an award for a death from the disease of anthrax, which was caused by anthrax bacteria entering the tissues through abrasions or fissures in the skin, was upheld; but in that case the fissures themselves were occasioned by accidents occurring in the course of and growing out of the employment. In Horrigan v. Post-Standard Co., 224 N. Y. 620, 121 N. E. 872, an award for the death of an employee was upheld, where the employee placed an injured hand in a urinal which he was cleaning, and thus received an infection from the results of which he died. The memorandum in that case does not disclose the fact that the injury to the hand occurred in the course of the employment. However, an examination of the record shows that the commission made a finding that a wound upon the hand opened while the employee was cleaning the urinal, so that accidental injury in the course of the employment preceded the infection. In Hart v. Wilson & Co., Inc., 186 App. Div. ——, 172 N. Y. Supp. 896, in which no opinion has been officially reported, an award for a death from lockjaw was upheld, where an employee, having cracks and crevices in his fingers constituting a species of eczema, contracted the disease of lockjaw while working among hides containing the bacteria of tetanus. The record in that case discloses that the cracks and crevices in his fingers were the natural consequences of his work in water as a wool sorter, and thus accidental injury in the course of employment preceded the contraction of lockjaw.

These three cases, therefore, all fall within the express terms of the Workmen's Compensation Law which permit recovery for the consequences of disease when the disease itself is the result of injury. There are also numberless cases in which awards for disabilities or death have been sustained where traumatic injuries, aggravating, but not causing, diseases, were involved. It is true that the diseases in these cases did not "result" from "accidental injury" within the meaning

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of the definition now under consideration, since the diseases pre-existed the injuries. However, the Workmen's Compensation Law, in section 10, as already noted, provides for compensation "for the disability or death" of an employee "resulting from an accidental personal injury," and in these instances the disabilities or deaths all resulted from such an injury though the diseases involved did not. These cases, therefore, are not in the least significant upon the question now under consideration.

[2] It is a matter of common knowledge that the conditions generally prevailing in cases of infectious disease are caused by poisons or toxins exuded by living organisms or bacteria present within the human body.

"It may now be stated as an accepted fact that all the important results of bacteria in the tissues are due to poisonous toxins formed by them." Enc. Brit. subject "Bacteriology."

It is in this respect that a condition of disease differs from a condition resulting from the taking of a poisonous drug. In the former all the poisons which harm or kill are generated within the human body, while in the latter all the poisons are extraneous. It is one of the characteristics of injuries that they are the result of the application to the human body, internally or externally, of an external force. Years of study and consideration given by insurance experts to the subject of accidental injuries have resulted in the framing of policies of accident insurance to cover as a general rule only those injuries which are caused by "external, violent, and accidental means." Corpus Juris, vol. 1, p. 489. Death resulting from asphyxiation has been held to be due to such a cause. Paul v. Travelers' Insurance Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758. In that case it was said:

"As to the point raised by the appellant that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause."

We have held that death from sunstroke, and disabilities from frost bite, are accidental injuries which are compensable. Claim of Hernon v. Holahan, 182 App. Div. 126, 169 N. Y. Supp. 705; Claim of Days v. Trimmer & Sons, Inc., 176 App. Div. 124, 162 N. Y. Supp. 603. It may be that in such instances no violence is present, but it is undeniably true that in each the producing cause is an external force. In disease the cause is neither "external," "violent," nor "accidental." It can therefore never be an "accidental injury," except where a statute expressly includes it therein by particular definition.

In order to support the conclusion that certain diseases of the character under consideration are accidental injuries, various arguments have been advanced to show "external," "violent," or "accidental" means to be involved as causes.

A familiar argument is that such diseases are produced by "external" means, because the bacteria which cause them are introduced into the human body from without. Bacteria are daily received into the body, by contact or inhalation, without resultant disease. The fact of their presence is not the fact of disease. As pointed out, disease results only from the toxins which the bacteria produce while within the body, and the cause is native, not foreign, to that body. The argument would place substantially every infectious disease in the injury class, since in nearly every instance such a disease is produced by bacteria which are the outgrowth of bacteria introduced into the body from without.

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Another argument is that in certain diseases the cause is "violent," because of the impact of bacteria when they invade the body. Thus it was remarked by Macnaghten, L. J., in Brintons, Ltd., v. Turvey, 7 W. C. C. 1, concerning the contraction of anthrax:

"It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye."

And of the decision in that case it was said in Steel v. Cammell, Laird & Company, Ltd., 2 K. B. 232, by Cozens-Hardy, L. J.:

"There the impact of the bacillus upon the particular spot where the disease developed was proven as a fact."

In a dissenting opinion in the case before us the Presiding Justice, doubtless in deference to the high authority of these utterances, makes this statement concerning the disease under consideration:

"The presence of the disease in man, therefore, indicates clearly that, with more or less force, infectious germs have been carried from the diseased horse to the man."

It seems to me that the reasoning thus adopted is not sound, and that it illustrates the strain to which those, who seek to make disease synonymous with injury, are put, when they try to justify their conclusions. Is it not an extraordinary argument that there is a blow, a traumatism, a violent act involved, when microscopic organisms, whose bodies are not visible, whose touch cannot be felt, whose presence cannot be known, pass into the lungs with the air by which they are carried, or into the blood through open sores which that air touches? Granted that there is an impact of bacteria whenever they enter the body, so that accidental injury occurs, then every day of our lives we receive accidental injuries, for daily we breathe in bacteria, or take them into our systems, without resultant disease. Once more, the argument fails unless we are to include all infectious diseases within the class of accidental injuries.

A further argument is made that in cases of the character under consideration there is accidental injury, because there is an "accidental means" or occurrence involved in the inception of the disease. The argument overlooks the fact that under the Workmen's Compensation Law of this state the disease, to be compensable, must follow, not merely accident, but injury as well. The word "accident" and the word "injury" are not synonymous. Accidents occur without injury, and injuries occur without accident. The critical question in this examination is whether or not a disease is ever an injury, not whether a disease is ever an accident, or accidentally caused. However, if we assume that "accident," and "injury" are one, we are not in the least advanced towards a working rule concerning the classification of diseases by making the criterion the presence or absence of an accident. If it can ever be said that there is involved an accident or an occurrence in the sudden invasion of the human body by bacteria, then in substantially all infectious diseases there is a precedent accident, and therefore an accidental injury. It was said in Marshall v. East Holywell Coal Co., 7 W. C. C. 19:

"The accident must be something which is capable of being assigned to a particular date, and which is in the popular and ordinary sense an accident."

There is always a definite point of time, and in this sense an occurrence, whenever bacteria invade the body, and the suggestion that the result of the invasion is disease or injury, accordingly as you know or do not know the precise moment when the invasion takes place does not recommend itself. In Brintons, Ltd., Turvey, supra, Robertson, L. J., in a dissenting opinion, remarked, concerning the

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statement of the County Court judge relating to the contraction of anthrax, that it was due to the "accidental alighting of a bacillus from the infected wool on the man's eye," as follows:

"But, while scientifically accurate, this vivid presentment as of a concrete, although occult, incident must not blind us to the fact that any other case of disease falling within the wide scope of bacteriology might with equal accuracy be traced to the occurrence of a similar accident."

I am aware of the fact that in Brintons, Ltd., v. Turvey, supra, the disease of anthrax was classed as an accidental injury, though it arose without previous abrasion of the skin or other traumatic injury. In that case the Lord Chancellor, who wrote one of the prevailing opinions, seemed to find himself in this difficulty over the phrase "accident causing injury," which was under consideration, namely, that unless "disease" was to be included within the word "injury" there could be no recovery for the results of disease, even though the disease itself followed accidental injury. Thus he says:

"It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted. Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands. The injury caused thereby sets up erysipelas—a definite disease. Some trifling injury by a needle sets up tetanus. Are these not within the act, because the immediate injury is not perceptible until it shows itself in some morbid change in the structure of the human body, which, when shown, we call a disease?"

In the corrosive acid case, an extraneous poison touched the hands, and there was traumatic injury antecedent to disease, just as clearly as if the hands had been burned by fire. In the tetanus case the pricking of a needle is assumed, and there is traumatic injury succeeded by disease. It may be said of the opinion of the Lord Chancellor that, had he been dealing with the Workmen's Compensation Law of the state of New York, he would not have been troubled with the thought that if a contrary holding was made diseases which were the consequences of traumatic injuries would not be compensable, for our law provides for all such cases when it defines "injury" and "personal injury" to be "accidental injury," and such disease or infection as may naturally and unavoidably result therefrom." Decisions of other jurisdictions, which have to do with the interpretation of statutes worded otherwise than the Workmen's Compensation law of the state of New York, are valueless as commentaries upon the law now under consideration.

We have seen that all the arguments advanced in reported cases to classify a particular disease under consideration as an accidental injury logically result in placing all diseases in the "injury" class. Nor can any argument be made by which one group of diseases may be distinguished for purposes of compensation from any other group. It is frequently suggested that conditions resulting from the nature of an employment, such as lead or arsenical poisoning, may be regarded as belonging to a separate class of occupational diseases, which should be denied compensation. If a so-called occupational disease were a true disease, arising without accidental injury, it would seem somewhat extraordinary that it should be made noncompensable, while other diseases having a more remote relationship to an employment should be held to be the proper subjects of an award. The truth of the matter is that in such instances there is initial injury through the absorption into the system of lead and arsenic, which gradually bring about sickness or perhaps disease. There is, however, no injury which is accidental, for it is inflicted through a period of months or years, and if disease results it

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nevertheless does not follow "accidental injury." It is entirely plain that we must accept all diseases as compensable without precedent injury, or reject all such diseases, for there is open no middle course. Our Workmen's Compensation Law decides the matter, for, by expressly including diseases which "result" from "accidental injury" within the definition which it gives of compensable injuries, it excludes therefrom by clear implication all diseases, otherwise arising.

The particular disease under consideration is glanders, which was contracted without precedent accidental injury. Glanders is a true disease, resulting from toxins produced within the body by bacterial action. This is a necessary conclusion from the facts recited in a transcript from the records of the hospital where the deceased was confined. After giving glanders as the cause of death, the transcript makes the statement:

"November 2, 1917. Glanders bacilli found in postules and subcutaneous abscesses."

Glanders is defined in the Encyclopædia Britannica as follows:

"Glanders or farcy, a specific, infective, and contagious disease, caused by a tissue parasite (bacillus mallei), to which certain animals, chiefly the horse, ass, and mule, are liable, and which is communicable from them to man."

Glanders cannot be differentiated from other diseases by the fact that ordinarily it is a disease which affects a horse rather than a human being, for it cannot matter whence the bacteria have proceeded which set up disease within the human body. Anthrax is a disease which commonly affects sheep and cattle, and is communicable from them to man, yet of the effects of anthrax it was said in Bacon v. U. S. M. A. Ass'n, supra:

"The difference between the cause of this condition and the causes of typhoid fever, tuberculosis, smallpox, scarlet fever, and such like diseases, is that this particular condition is caused by different bacilli from the others, and they come in contact with the skin or enter into its pores, while in the other cases they are generally breathed in."

Except that the bacilli differ, glanders does not differ from the diseases named in the quotation. We think that for legal purposes glanders is a disease which, when contracted without previous accidental injury occurring in the course of employment, cannot be classed under the Workmen's Compensation Law of this state as an accidental injury arising out of and in the course of employment. We therefore conclude that the question should be answered in the negative, the award reversed, and the claim dismissed.

The question is answered in the negative, the award reversed, and the claim dismissed. All concur, except

JOHN M. KELLOGG, P. J. (dissenting). Glanders or farcy is a horse disease. It rarely afflicts man, but, when it does, is usually caused by germs from the secretions of the nose of the diseased horse inoculating him through an abrasion of the skin or mucous membrane, usually of the nose. It is said, however, that experiments have demonstrated the possibility of inoculation through sound skin or sound mucous membrane. The presence of the disease in man, therefore, indicates that, with more or less force, infectious germs have been carried from the diseased horse to the man and inoculated him through an abrasion of the skin or a break in the mucous membrane.

The employer had in his stables a glandered horse, which was to be taken to the dock to be killed. The horse was kept in the basement, away from the other horses, and the decedent had nothing to do with it, and was not near it until, at the request of the employer, he led it in the

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evening to the dock. It does not appear that any other horse in the stable had the disease, or that the employee had been otherwise exposed. The morning following, the decedent was sick, showing the symptoms of glanders, and he died from that disease in about two weeks. The commission found no abrasion of the skin, and therefore concluded that the inoculation came through inhalation. It is therefore reasonably certain that the germs of glanders, emitted from the nostrils of the horse, entered the nostrils of the employee at a break in the mucous membrane, with the result that he died of glanders in about two weeks.

It seems clear that the employee's death resulted from an accidental injury within the meaning of the Workmen's Compensation Law.

"Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. To the scientist, who traces the origin of disease, there may seem to be no accident in all this. 'Probably it is true to say that, in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident.' Halsbury, L. C., in Brintons v. Turvey, L. R. [1905] A. C. 230, 233. But our point of view, in fixing the meaning of this contract, must not be that of the scientist. It must be that of the average man. Brintons v. Turvey, supra; Ismay, Imrie & Co. v. Williamson, L. R. [1908] A. C. 437, 440. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, and unlooked for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts." Lewis. Ocean Acc, & G. Corp., 224 N. Y. 18, 20, 21, 120 N. E.. 56, 57

That case arose under an accident policy insuring against "loss or disability, resulting directly, independently, and exclusively of all other causes, from bodily injuries effected solely through accidental means." Death was due to inflammation of the brain produced by the germ known as the "staphyloccus aureus," which came from an infected perforated pimple upon the lip. The court considered the death accidental.

"The word 'accident' is susceptible of and has received many definitions, varying with the connection in which it is used. * * * As used in an indemnity policy, such as this, we are of the opinion that the word 'accident' means an undesigned and unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured." Melcher v. Ocean Accident & Guarantee Corp., 226 N. Y 51, 56, 123 N. E. 81.

The words "accident," "injury," and "disease" are very flexible in meaning, and are to be construed according to the true intent and spirit of the statute or contract in which they are found, with reference to the particular circumstances under consideration.

An employer negligently allowed the supply of drinking water to be contaminated with typhoid fever germs, and, from drinking the water, an employee contracted typhoid fever, which proved fatal. It was held that the death was due to accident within the Compensation Law. Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293; Ætna Life Ins. Co. v. Portland Gas & Coke Co., 229 Fed. 562, 144 C. C. A. 12, L. R. A. 1916D, 1027.

A hostler contracted glanders from a diseased horse and died of that disease, and the Supreme Judicial Court of Massachusetts (Hood v. Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. [N. S.] 1192, 138 Am. St. Rep. 379) held it was an accidental death; the court saying:

"It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders, as much so as if he had had a leg or an

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arm broken by a kick from a vicious horse. * * * It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease."

In Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. Supp. 767, an employee contracted the disease of anthrax while handling hides, and we held it an accidental injury within the Compensation Law. In that case, it is true, the germs entered an abrasion of the skin; in this case they evidently entered a break in the membrane of the nose. Justice Cochrane, in his opinion in that case explains Bacon v. U. S. M. A. Association, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748.

Anthrax, caused by a germ, settled on the eye of a wool sorter, without any apparent physical injury, is an accidental injury. Brintons, Ltd., v. Turvey, supra.

Sunstrokes and heat strokes have been held to be accidental injuries, where apparently there was no physical injury. Hernon v. Holahan, 182 App. Div. 126, 169 N. Y. Supp. 705; Campbell v. Clausen-Flanagan Brewery, 183 App. Div. 499, 171 N. Y. Supp. 522; Bradbury's Workmen's Compensation Law (3d Ed.) 383, 443; Ismay, Imrie & Co. v. Williamson, 99 L. T. 595, 1 B. W. C. C., 232.

It is not strictly accurate to say that anthrax, glanders, and like diseases are only compensable when they follow an independent traumatism arising in the course of the employment. If the decedent had been inoculated through a pre-existing abrasion upon his hand, there would seem to be little difficulty in saying that the death came from an accidental injury. It is immaterial when or how the abrasion in the skin or the break in the mucous membrane occurred; the important fact is the accidental infection, the real producing cause of the death.

The germs did not knock the employee down or break his jaw; but concededly they caused his death. The death occurring from a risk of the employment, it is better to rest upon the ordinary presumption in favor of the claim than to resort to fine-spun theories to destroy it. The decedent knew that the horse had glanders, and that it was being killed to prevent the spread of that disease, and he evidently exercised due care to avoid infection and to be at all times a safe distance from the horse. We are not required to assume that the mere breathing of the horse and the man carried the germs and caused the inoculation. It is more probable that a sneeze or cough, or a sudden toss of the head of the horse, caused the infectious matter to go some distance, and that such unexpected act brought about the inoculation. In any event, by pure accident, the germs passed, with more or less force, from the horse to the man. It is unnecessary to inquire whether the death was caused by the particular germs which actually made the passage; they were the proximate cause of the death, and in the cases above cited, of the typhoid germs, the glanders germs, and the anthrax germs, that matter was not deemed important. The germs which entered the body were treated as the cause of the trouble which resulted from them.

Frequently the time, the place, and circumstances are important factors in determining whether an infection or injury is the result of accident. If the infection takes place at a definite known time, from a definite known cause connected with the employment, it may, within the liberal spirit of the law, be considered an accidental injury, while, in the absence of such conditions, the disability might be attributable to general causes, or treated as arising from a vocational disease or otherwise.

Matter of Horrigan v. Post-Standard Co., 224 N. Y. 620, 121 N. E. 872, is on all fours with this case.

Another question, not raised in the briefs, is present in the case. It is currently assumed, I think erroneously, that the Workmen's Compen-

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sation Law applies only where an accident is shown. The amendment to the Constitution upon which the Compensation Law rests does not limit compensation to cases of accident. It is evident that the Legislature may award compensation for any injury resulting from the employment. Subdivision 7 of section 3 of the Workmen's Compensation Law defines injury and personal injury:

"'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

The word "therefrom" at the end of the sentence logically and grammatically refers back to the word "employment," and not to the words "accidental injuries." Is that the legislative meaning, or was the section intended to limit the words "injury" and "personal injuries" to "accidental injuries"? In my opinion a disease or infection naturally and unavoidably resulting from the employment is compensable under the statute. Each word in the section should have a meaning, and unless I am right in the construction the provision as to diseases and infection is without meaning. If an accidental injury naturally unavoidable results in disease or infection, the disease or infection would at common law be considered as part of the damages resulting from the accident. The closing words of the subdivision, therefore, were not necessary to cover such a case, and if no other cases were intended to be covered the language is clearly superfluous. The Legislature appreciates the value of words, and presumably does not waste them, and it is proper construction to give force, so far as may be, to all of the words of the statute. These words cannot be given force without the result that diseases and infections naturally and unavoidably resulting from the employment are within the statute. I assume that the word "unavoidable" does not mean that the disease or infection must necessarily follow to every person engaged in the employment, but fairly means that the disease or infection naturally results from the employment and from no other source, and that the injured party did not outside of the employment bring the disease or infection upon himself, but the unavoidable conclusion is that it came from the employment and not otherwise.

If we are wrong in concluding that there was an accidental injury, nevertheless the award may stand.

I favor affirmance.

Cochrane, J., concurs in this dissent.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

THOMPSON

v.

FOUNDATION CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—CONTRACT OF EMPLOYMENT.

Where workmen's compensation claimant received letter in New York offering work in Pennsylvania, to which he did not respond, but

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 58.

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soon went to Pennsylvania, entered into written contract of employment, and was there injured, the contract was made in Pennsylvania, and he is not entitled to award under New York Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 368.)

Appeal from State Industrial Commission.

Proceeding for workmen's compensation by Christ Thompson, employee, opposed by the Foundation Company, employer, and the Employers' Mutual Insurance Company, insurer carrier. Award for claimant, and opposing parties appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane and Henry T. Kellogg, JJ.

Blauvelt & Warren, of New York City (F. W. Catlin, of New York City, of counsel), for appellants.

Charles D. Baker, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

Henry T. Kellogg, J. The employer was a New York corporation, having its principal office in the city of New York. It was engaged in construction work in the state of New York and in the state of Pennsylvania. The claimant was employed as a carpenter in a building which the employer was constructing at Jefferson, Pa. While thus at work in Jefferson, Pa., he sustained an accidental injury. He thereafter entered into an agreement with his employer for the payment of compensation under the Workmen's Compensation Law of the state of Pennsylvania (P. L. 1915, p. 736). The agreement having been confirmed by the Workmen's Compensation Board of that state, he subsequently received substantial weekly compensation thereunder for nearly one year. He then filed a claim for compensation under the Workmen's Compensation Law of the state of New York (Consol. Laws, c. 67), and obtained the award from which this appeal is taken.

The award was granted solely on the theory that the contract of employment was entered into in the state of New York, whereas the undisputed facts clearly established that the contract was made in the state of Pennsylvania. The claimant, while in New York, had received a letter from a boss carpenter, engaged in work for the employer on the building in question at Jefferson, Pa., telling him that there was a job there for him, and asking him to come over with a few more men. The claimant did not respond to this letter, but, shortly after receiving it, journeyed to Jefferson, Pa., there entered into a written contract of employment, and, having begun work in that place for his employer, received the injuries in question. The letter which he received in New York was an incomplete and indefinite offer, the acceptance of which in New York would not have created a contract, for the offer contained no term concerning compensation, hours of labor, character of work, or any other thing by which the employer would be definitely bound, if there were an acceptance.

Moreover, there was no overt act on the part of the claimant, unequivocally indicating an acceptance of any offer, through which claimant would be bound, were the offer sufficient. He started on a journey for Jefferson, Pa., on receipt of the letter; but this may or may not have been for the purpose of accepting the indefinite offer made him. It is clear that the contract was made in Jefferson, Pa., where a written agreement was entered into between the claimant and his employer. The award should be reversed, and the claim dismissed.

Award reversed, and claim dismissed.

Lyon, Woodward, and Cochrane, JJ., concur.

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JOHN M. KELLOGG, P. J. (concurring in result). The defendant employer requested the plaintiff to go from Brooklyn to Jefferson, Pa., and work for it on a particular job, at a fixed wage, with transportation added; the usual terms of employment prevailing on the job. Plaintiff complied with the request and went to work upon the job pursuant to it. When he arrived at Jefferson, if the company had repudiated the contract, he undoubtedly could have recovered for his transportation and such damages as he had fairly sustained.

The contract of employment did not contemplate any service in New York, and the plaintiff was not an employee of the company for any service in this state. This case is more favorable to the appellant than Gardner v. Horseheads Construction Co., 171 App. Div. 66, 156 N. Y. Supp. 899. But that case has been somewhat damaged and left in an uncertain position by Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, Klein v. Stoller & Cook, 220 N. Y. 670, 116 N. E. 1055, and Fitzpatrick v. Blackall & Baldwin Co., 220 N. Y. 671, 116 N. E. 1044. These latter cases have caused us at times to ignore the Horseheads Case, but there seems to be some life remaining in it. Matter of Smith v. Heine Boiler Co., 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316. This latter case gives me courage to again assert the doctrine of the Horseheads Case, and to maintain that the employment in this case is not within the New York Workmen's Compensation Law.

If I am wrong in this position, the question is so much involved in doubt that the election by the claimant to take compensation under the Pennsylvania law and his receiving such compensation for about a year, is binding upon him, and, under the circumstances of this case, stands in the way of compensation here.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION. THIRD DEPARTMENT.

PROFETA ET AL.

v.

RETSOF MINING CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEPENDENCY OF PARENTS.

In proecedings by parents for compensation for death of son, the controlling consideration, under Workmen's Compensation Law, § 17, as amended by Laws 1916, c. 622, § 5, is whether the son, either wholly or in part, supported parents during the year prior to the accident, and in absence of evidence of such support, award to parents will not be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Law by Pasquale Profeta and another for compensation for death of their son, Andrea Profeta,

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 60.

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opposed by Retsof Mining Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. From an award of the State Industrial Commission for claimants, the employer and insurance carrier appeal. Reversed, and matter remitted to State Industrial Commission.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Bertrand L. Pettigrew, of New York City (W. L. Glenney, of New York City, on the brief), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. Claimants' intestate was employed by the Restof Mining Company, and was accidentally killed, in the performance of his duties, on the 29th day of January, 1918. The only question involved on this appeal is whether his father and mother were dependent upon him, and the award which has been made must depend upon the evidence tending to show that the decedent had "supported, either wholly or in part, for the period of one year prior to the date of the accident" (Workmen's Compensation Law [Consol. Laws, c. 67] § 17, as amended by Laws 1916, c. 622, § 5) the claimants. The question of support, in whole or in part, for the year, is the controlling consideration (Casella v. McCormick, 180 App. Div. 94, 95, 167 N. Y. Supp. 564); and it has been held that "the mere fact that a father receives money from a son and expends it is not alone sufficient to establish dependency" (Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 51, 167 N. Y. Supp. 520, 523).

The record before us consists of papers alleged to have been prepared and subscribed in Italy, open to the same objections which exist in the Matter of Claim of Pifumer v. Rheinstein & Haas, Inc., 175 N. Y. Supp. 848, and nowhere in the case does it appear, from any competent evidence, that the decedent "supported, either wholly or in part, for the period of one year prior to the date of the accident," the claimants in this case.

The award appealed from should be reversed, and the proceeding remitted to the Industrial Commission. All concur, except John M. Kellogg, P. J., who dissents.

SUPREME COURT OF NEW YORK.

SPECIAL TERM, KINGS COUNTY.

DZIENGELEWSKY

v.

TURNER & BLANCHARD, INC.*

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS—DEATH OF LONGSHOREMAN—RIGHT OF ELECTION.

Plaintiff, whose intestate, a longshoreman in the employ of defendant, was engaged in loading a steamship from a lighter alongside a

*Decision rendered, April, 1919. 176 N. Y. Supp. 729.

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steamship, and who, while descending a companionway attached to the side of and belonging to the ship, but which was being used by defendant, was thrown into the water and drowned when the companionway broke, in view of the Judicial Code, might elect whether to take an award under the Workmen's Compensation Law of New York or to bring an action at common law for damages.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Action by Mary Dziengelewsky, as administratrix of Wladyslaw Dziengelewsky, against Turner & Blanchard, Incorporated. Verdict for plaintiff, and defendant moves to set aside the verdict and for a dismissal of the complaint. Motion denied.

Stephen A. Macheinski, of New York City (John C. Robinson, of New York City, of counsel), for plaintiff.

Amos H. Stephens, of New York City (William L. Kiefer, of New York City, of counsel), for defendant.

VAN SICLEN, J. The plaintiff has recovered a verdict against the defendant after a full and complete trial of all the issues raised thereon. The defendant now moves to set aside the verdict and for a dismissal of the complaint.

The cause of action is somewhat similar to other causes of action which have heretofore recently been tried and disposed of before this court, and it may be that the law affecting the same is not entirely free from doubt and confusion.

Plaintiff's intestate was a longshoreman in the employment of the defendant, and at the time of his death was engaged in loading a steamship in the river or harbor with freight from a lighter, which was moored alongside of said ship. In order to perform the work, it was necessary for the plaintiff's intestate, with other men thus engaged, to from time to time descend from the steamship to the lighter, and, vice versa, to ascend from the lighter to the steamship, using a companionway attached to the side of the ship and leading down to the lighter. Said companionway belonged to the ship, but was used by the defendant. On the day of the accident plaintiff's intestate, with others, started to return from the steamship to the lighter, and while descending said companionway it broke, and the four men were precipitated into the water, and plaintiff's intestate was drowned. The action is against the employer of plaintiff's intestate only, and not against the owners of the steamship.

Upon the trial the attorney for the defendant made various motions to dismiss the complaint, which, upon this motion, are in substance repeated. The defendant contends that, if there is any liability, it is that of the owners of the ship, because the accident was brought about by reason of a defect in some appliance furnished by the ship or in some part of the ship's equipment; that, if plaintiff's intestate has any right or claim against the defendant herein, such is by way of the Workmen's Compensation Act of the state of New York (Consol. Laws, c. 67); and that, if plaintiff's right to recover under said Workmen's Compensation Act is not exclusive, then the cause of action is maritime in its nature, and this action as here brought is improper in form, both as to the allegations specifying the grounds of the right to recover and as to the amount of the indemnity sought.

The plaintiff urges that her right to recover finds full support under the federal Judiciary Code (Act Cong. March 3, 1911, c. 231, 36 Stat. 1087) as amended prior to the happening of the accident hereinbefore mentioned, and that the plaintiff is expressly given the right to bring her action in the state courts and to assert her common-law rights and to have recovery therefor. The plaintiff cites the case of Southern Pa-

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cific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, as a supporting authority, and contends that in such cases as that of plaintiff there is the right to elect whether to take compensation under the Workmen's Compensation Law of the state of New York or whether to bring an action at common law, as plaintiff has elected to do in this case. Nilsen v. American Bridge Co., 221 N. Y. 12, 116 N. E. 383.

A careful reading of the briefs submitted on this motion, and a full consideration of the arguments made and the cases cited, convinces this court that the plaintiff was within the law by coming in the state court and asserting her common-law right to recover damages for the loss of her husband while engaged in maritime work. See Liverani v. Clark & Son, 176 N. Y. Supp. 725.

A decision of our highest state court is desirable, definitely determining the matters involved herein, so that all doubt and confusion, either real or apparent, may be finally determined. The defendant's motion is denied with exception, together with 30 days' stay and 30 days to make and serve a case.

Motion denied.

SUPREME COURT OF NEW YORK.

TRIAL TERM, KINGS COUNTY.

SIMPSON

v.

ATLANTIC COAST SHIPPING CO.*

ADMIRALTY—INJURIES TO SERVANT—APPLICATION OF COMPENSATION ACT TO MARITIME EMPLOYMENT.

Despite the Workmen's Compensation Act, a servant, for injuries sustained while engaged in maritime work, may come into the state courts and assert his common-law right to recover damages, particularly where the Compensation Act is not pleaded as a defense.

(For other cases, see Admiralty, Dec. Dig. § 20.)

Action by one Simpson against the Atlantic Coast Shipping Company, resulting in a verdict for plaintiff. On motion to set aside verdict. Motion denied.

DELEHANTY, J. Counsel for the respective parties hereto have, I believe, presented every argument and important citation that has been advanced in connection with the question for determination in this case, and while the point involved is not free from difficulty, I am inclined to adopt the view expressed by Mr. Justice Van Siclen in Dziengelewsky v. Turner & Blanchard, Inc., 176 N. Y. Supp. 729, to the effect that, despite the Workmen's Compensation Act (Consol. Laws, c. 67), a plaintiff may still come into the state courts and assert his common-law right to recover damages for injuries sustained while engaged in maritime work. As the Workmen's Compensation Act was not pleaded as a defense herein, I consider the decision cited as particularly applicable.

Motion to set aside verdict accordingly denied. Settle order on notice.

*Decision rendered, April 12, 1919. 176 N. Y. Supp. 731.

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SUPREME COURT OF NEW YORK.

TRIAL TERM, KINGS COUNTY.

RUDDY

v.

MORSE DRY DOCK & REPAIR CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COMMON-LAW LIABILITY.

Under Workmen's Compensation Law, §§ 11, 52, there is no common-law liability for injuries to which the Compensation Law is applicable, unless the employer has failed to provide the required insurance.

(For other cases, see Master and Servant, Dec. Dig. § 351.

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—MARITIME WORKERS.

In view of the Judicial Code, § 24, subd. 3, and section 256, subd. 3, as amended by Act Cong. Oct. 6, 1917, §§ 1, 2 (U. S. Comp. St. 1918, §§ 991, 1233), the Workmen's Compensation Law *held* enforceable by maritime workers covered by section 2, groups 8, 9, and section 3, subds. 1, 4.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

5. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—PLEADING.

In action for employee's death, complaint alleging common-law liability, showing on its face that employee's employment brought him within Workmen's Compensation Law, but omitting to allege employer's failure to provide required insurance under sections 11 and 52, so as to give rise to common-law liability, is defective.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Action by Elizabeth Ruddy, as administratrix, etc., of Edward Lee Ruddy, deceased, against the Morse Dry Dock & Repair Company. On motion for new trial after dismissal of complaint. Denied.

Jas. P. Kohler, of Brooklyn (John C. Robinson and Theodore H. Lord, both of New York City, of counsel), for plaintiff.

Henry C. Hunter, of New York City (Hamilton Anderson, of New York City, of counsel), for defendant.

CROPSEY, J. The question involved is the effect of the amendments of 1917 to section 24, subd. 3, and section 256, subd. 3, of the United States Judicial Code (Act Cong. March 3, 1911, c. 231, §§ 24, 256, 36 Stat. 1091, 1160, as amended by Act Cong. Oct. 6, 1917, c. 97, §§ 1, 2, 40 Stat. 395 [U. S. Comp. St. 1918, §§ 991, 1233]).

The deceased met his death while working on a vessel. His administratrix brings this action against his employer, alleging a common-law liability. The defendant claims that such an action does not lie, at least not in the absence of a claim that the defendant failed to provide insurance under the Workmen's Compensation Law (Consol. Laws, c. 67). It seems plain, and in fact it is not disputed, that the Legislature intended to include such occupations as the deceased's within the purview of that law. Section 2, groups 8 and 9, and section 3, subdivisions 1 and

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*Decision rendered, May 14, 1919. 176 N. Y. Supp. 731.

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4. The language used covers such an employment without question. But the United States Supreme Court has held that under the acts of Congress as they then existed this act was invalid, in so far as it applied to maritime torts. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C. 451, Ann. Cas. 1917E, 900. From this it followed that, inasmuch as a workman employed on vessels was not entitled to benefits under the Workmen's Compensation Act, his common-law remedies still continued; for, though section 11 of that law provides that the benefits specified in it measure the exclusive liability of an employer, unless he fails to provide the insurance required, that applies only to occupations that come within the statute; and so, when the act was held invalid as to maritime torts, that provision no longer applied to such cases.

Thereafter Congress adopted the amendments to the Judicial Code above stated. They were of the phrase, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," by adding thereto the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." U. S. Comp. St. 1918, § 1233. What are the meaning and effect of these amendments? Are they constitutional?

The plaintiff claims that by these changes this plaintiff and all others similarly situated were given the election either of taking the benefits prescribed by a state Workmen's Compensation Law, or of bringing a common-law action, or of proceeding in admiralty. But how can there be such an election?

[1, 2] If the Workmen's Compensation Law is applicable, then surely its provisions, making its benefits the exclusive liability of the employer, must be effective, and there can be no common-law liability. The state statute gives no election to the employee unless the employer has failed to furnish the required insurance (sections 11, 52); and, if he has so failed, then the employee may sue as if there was no statute. But if the employer has complied with the statute, there can be no election by the employee. He cannot then determine which remedy he will pursue. He must take the benefits provided by the statute. Furthermore, Congress could not broaden the effect of a state statute. No act of it could give an employee an election of remedies in the state court which was not given by the state statute. What, then, is the effect of the 1917 amendments?

[3] They must have to do with the right to take proceedings in the United States courts, not in the state courts. The amendments, coming as they did after the Jensen decision, have an added significance. In that case the attempt was made to hold the employer liable under the Workmen's Compensation Law, and it was upon the employer's appeal that the United States Supreme Court rendered its decision, holding that the state statute did not apply to maritime workers. The amendments evidently were intended to overcome the effects of that decision, by making state statutes, which in terms covered such workers, valid and enforceable by maritime workers as well as by others.

[4] Even had a different conclusion been reached, the fact that the United States District Court has construed these amendments, and has held that they did away with any right to sue in admiralty, and hence necessarily made valid the provisions of the state statute, should be given controlling weight. The Steam Lighter Howell (U. S. Dict. Ct., Southern District of N. Y., March 6, 1919, Learned Hand, D. J.) 256 Fed. ——. The constitutionality of the amendments was also passed upon and upheld in the same case. These views are not in harmony with the decisions in Dziengelewsky v. Turner & Blanchard Inc., 176 N Y. Supp. 729, and Simpson v. Atlantic Coast Shipping Co., 176 N. Y. Supp. 731, per Delehanty, J.; but at the time they were rendered the District Court case had not been reported.

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[5] Both sides seek a decision on the principal question that has been discussed, and not on the question of pleading. It is understood that there is no question that the defendant had complied with the statute. But, if there were that question, the omission to allege such a failure in the complaint makes it defective If the plaintiff would succeed at common law, the complaint, showing, as it does, that the deceased's employment brought him within the Workmen's Compensation Law, must further show the defendant's failure to comply with the statute; otherwise, the exclusive liability provision would prevent recovery, and so render the complaint deficient.

The dismissal of the complaint was proper, and the motion for a new trial must be denied.

SUPREME COURT OF PENNSYLVANIA.

BELMONTE
v.
CONNOR.*

MASTER AND SERVANT — WORKMEN'S COMPENSATION BOARD—EMPLOYMENT—REVIEW.

A finding by the referee and the compensation board that a workman at the time he was killed was an employee and not an independent contractor is conclusive, and not reviewable by the court on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceeding by Catarina Belmonte against Thomas Connor. From a judgment dismissing an appeal from an award of the Workmen's Compensation Board, affirming an award made by referee on his finding that plaintiff's husband was an employee at the time of injury, defendant appeals. Appeal dismissed, and award affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

William G. Wright and R. P. F. Maxwell, both of Philadelphia, for appellant.

Owen J. Roberts and Francis S. Goglia, both of Philadelphia, for appellee.

PER CURIAM. The only question before the referee and the compensation board, which was one of fact. was as to the relation which the husband of the appellee sustained to the appellant at the time he was killed. The finding of the board was that he was an employee, and not an independent contractor, as the defendant contended. This finding is conclusive. Messinger v. Lehigh Valley R. R. Co., 261 Pa. 336, 104 Atl. 623.

Appeal dismissed and award affirmed.

*Decision rendered, February 17, 1919. 106 Atl. Rep. 787.

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SUPREME COURT OF PENNSYLVANIA.

MURDOCK

v.

NEW YORK NEWS BUREAU ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—QUESTION OF LAW—APPEAL TO COMPENSATION BOARD

Contention that there was no evidence to sustain referee's conclusion that the deceased employee's death was the result of an accident raised a question of law, which the Workmen's Compensation Board had power to determine under Workmen's Compensation Act June 2, 1915, § 420, upon consideration of the legal adequacy of the testimony taken before the referee.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF COMPENSATION BOARD—REVIEW.

Under the Workmen's Compensation Act of June 2, 1915, review by the Supreme Court is on certiorari only, and, while it may not consider the testimony, it is authorized to examine the findings and reasons stated in the adjudications of the referee, the board of compensation, and the court below to determine whether the decision is founded upon a proper basis.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEATH AS RESULT OF INJURY—EVIDENCE.

In widow's proceeding, under Workmen's Compensation Act, June 2, 1915, an award by referee, confirmed by Workmen's Compensation Board and the court below, will be affirmed on appeal, where evidence supports findings that deceased, a lineman, fell from a pole after contact with charged wire, that on striking the ground, his knees doubled up and violently struck his chest, causing pain and indicating fracture of rib, and that a week thereafter lobar pneumonia caused his death.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY—EVIDENCE.

That a physician who examined deceased lineman failed to discover a fractured rib did not detract from weight to be given undisputed fact that he had received a blow on the chest when he fell from a pole, after contact with charged wire, and that blow was followed by continuous pain which a week later resulted in his death from lobar pneumonia.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceeding by Freda Murdock against the New York News Bureau and the Employers' Liability Assurance Corporation, Limited, insurer, for compensation for the death of plaintiff's husband, William S. Murdock. From a judgment dismissing an appeal from a decision

*Decision rendered, Febuary 10, 1919. 106 Atl. Rep. 788.

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of the Workmen's Compensation Board awarding compensation, defendants appeal. Affirmed.

Argued before Stewart, Moschzisker, Frazer, Walling, and Simpson, JJ.

Henry A. Craig and Russell Duane, both of Philadelphia, for appellants.

Louis Levinson, of Philadelphia, for appellee.

FRAZER, J. William S. Murdock, the husband of claimant, was employed as a lineman by the New York News Bureau, and, while engaged in the course of his employment at Eighth and Master streets in the city of Philadelphia, came in contact with a wire heavily charged with electricity, which caused him to fall from a pole upon which he was working to the street, a distance of 28 feet. Upon striking the ground his knees "doubled up" and came violently in contact with his chest, causing considerable pain during the day, and indicating the fracture of one or more ribs. Whether or not his ribs were broken, the physician who made an examination was unable to determine. The pain in the chest continued, making breathing difficult. After three days Murdock returned to his place of employment, but, on account of the constant severe pain in his chest, did not engage in his usual work, and later was obliged to return home and again call a physician, who then diagnosed his case as lobar pneumonia, from which he died ten days after the accident. These facts as stated are taken from the findings of the referee in proceedings under the Workmen's Compensation Act, and the conclusion of the referee, based upon them, is that death was due to lobar pneumonia resulting from the fall. The referee's findings were confirmed by the Workmen's Compensation Board, and the decision of the board was, in turn, sustained by the court below. From the action of the court in dismissing exceptions to the conclusions this appeal followed.

[1, 2] The single assignment of error is to the decision of the court below in dismissing exceptions to the action of the board, and in refusing to set aside the award on the ground of there being no evidence to sustain the conclusion of the referee to the effect that the disease causing Murdock's death was the result of the accident. This contention raises a question of law which the board had power to determine under section 420 of the Workmen's Compensation Act of June 2, 1915 (P. L. 736), upon consideration of the legal adequacy of the testimony taken before the referee. McCauley v. Imperial Woolen Co., 261 Pa. 312, 319, 104 Atl. 617. Review by this court under the above act is on certiorari only, and, while we may not consider the testimony, we are authorized to examine the findings and reasons stated in the adjudications of the board and of the referee, as well as of the court below, to determine whether or not the decision is founded upon a proper basis. McCauley v. Imperial Woolen Co., supra.

[3, 4] Appellant's contention is that the findings of the referee do not show his conclusions to be based upon proper testimony of experts to the effect that the disease from which Murdock died was the result of the injury received at the time of the accident, and, further, they also fail to indicate he was not exposed or subject to other conditions from which the disease might have been contracted, and that consequently the conclusion of the referee was without proper foundation in fact. With this contention we cannot agree.

The findings of the referee clearly show the injury to the chest resulted in continuous pain from the time of the accident until the

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trouble was diagnosed by the physician as lobar pneumonia, and we find nothing in the record to justify the inference that, between the time of receiving the injury and the development of the disease, there were other causes from which pneumonia might have been contracted. That the physician failed to discover a fractured rib does not detract from the weight to be given the undisputed facts that a blow on the chest received was followed by continuous pain, resulting a week later in the disease which finally caused death. The nature of the injury and its resultant effects, followed so closely by the development of the disease, constitute sufficient evidence to support the conclusion of the referee and the court below, particularly as a consideration of the record indicates ample expert medical testimony upon which the referee based his conclusion that the injury to the chest was the proximate cause of the disease which terminated in the death of claimant's husband.

The judgment of the court below is affirmed.

SUPREME COURT OF PENNSYLVANIA.

LEARY

v.

McILVAIN ET AL.*

MASTER AND SERVANT—AWARD BY WORKMEN'S COMPENSATION BOARD—EVIDENCE—AFFIRMANCE.

Decision of Workmen's Compensation Board that woman was entitled to compensation for husband's death as result of accident or injury in course of his employment *held* sustained by evidence that his bruised body was found between wheels of wagon in a washout, that he was a sober man and in good health. and report of coroner's physician stated that death was probably due to injuries.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceedings by Marguerite F. Leary against J. Gibson McIlvain and another, trading as J. Gibson McIlvain & Co., and the Manufacturers' Casualty Insurance Company. From a judgment sustaining an award of the Workmen's Compensation Board, defendants appeal. Affirmed.

Argued before Stewart, Moschzisker, Frazer, Walling, and Simpson, JJ.

Archibald T. Johnson and Russell Duane, both of Philadelphia, for appellants.

Jacob Mathay, of Philadelphia, for appellee.

FRAZER, J. Claimant is the wife of Dennis F. Leary, whose dead body was found by a park guard, lying under a wagon attached to a

*Decision rendered, February 10, 1919. 106 Atl. Rep. 785.

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team of horses he was employed to drive; the accident having occurred while deceased was returning the team to the stable at the end of his day's work. A claim made before the Workmen's Compensation Board was resisted on the ground that no evidence was adduced establishing the death to be the result of an accident or injury occurring in the course of employment. This contention was sustained by the referee and the claim disallowed; on appeal, however, to the board the decision was reversed, and an award made in favor of claimant. This award was subsequently set aside by the court of common pleas for the reason the board was without authority to reverse the referee's findings, unless after a hearing de novo, which was not had, and the case remanded to the board, with directions to proceed in the manner provided by the statute, and make such disposition of the claim as the evidence produced before them warranted. At the hearing the parties offered no evidence, but agreed the board should adopt and consider, as proofs in the case, the testimony taken before the referee as though heard by it (McCauley v. Imperial Woolen Co., 261 Pa. 312, 319, 104 Atl. 617), and, pursuant to that agreement and upon consideration of all the evidence in the case, an award in favor of claimant was made, from which defendants again appealed. and upon dismissal of their exceptions by the common pleas, the present appeal was taken.

The contention here, as in Murdock v. New York News Bureau, opinion filed herewith, is that the record is destitute of evidence to support the conclusion reached by the board to the effect that deceased met his death as the result of an accident occurring in the course of his employment within the meaning of the Workmen's Compensation Act (P. L. 1915, p. 736). The findings and opinions filed show that Leary, who was a teamster in the defendant's employ, was found dead about 7:30 on the evening of December 29, 1916, in Cobb's Creek Park, near Sixty-fourth and Webster streets, Philadelphia. His body was lying under the wagon with the left front wheel against the face and the reins in his hands. The wheel of the wagon, as well as the body of deceased, upon which there were bruises and blood stains on the neck, was in a gully, or washout, when discovered by the park officer. No post mortem was made to ascertain the cause of death; the report of the physician filed by the coroner, however, stated death was probably due to bodily injuries.

Deceased was a man in excellent health, and left defendant's place of business early in the morning with his horses and wagon to deliver lumber in a nearby town. Accompanying him on a similar errand was a fellow employee named Dempsey, also driving a team. The day was "bitterly cold," and on the way home, Leary having complained of being chilly, the two drivers stopped at a saloon, where each obtained a drink of liquor. Upon leaving the saloon Dempsey drove his team in advance of Leary. Nothing appears to show what happened subsequent to this until Leary's body was discovered, although there is a finding that deceased was seen driving in various directions in the neighborhood shortly before his body was found, apparently attempting to either find his way home, or for the purpose of avoiding streets in the neighborhood at the time considerably torn up owing to improvements under way. The record discloses no previous illness of deceased and though he had taken "a very small whisky" because of the cold, he had always been temperate and never known to be intoxicated. The board accounted for deceased's presence in the park by stating he had evidently lost his way in the dark, and concluded death was caused by reason of the front wheel dropping into the gully and throwing deceased forward and under the wagon, and, further, that death occurred, in the course of his employment, from injuries sustained by his fall. While it is true the referee previously

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reached a contrary conclusion, the difference of opinion. based on the testimony presented, does not warrant interference by this court. The findings referring to the condition and position of the body, and the circumstances previous to its discovery, as well also as that referring to the wounds on the body, indicate the board had before it evidence which fairly supported its conclusion that death resulted from injuries received in an accident occurring in the course of deceased's employment.

The judgment is affirmed.

COURT OF CIVIL APPEALS OF TEXAS.

TEXARKANA.

WESTERN INDEMNITY CO.

v.

PRATER ET AL. (No. 2125.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"EMPLOYEE"—INDEPENDENT CONTRACTOR— EVIDENCE.

Evidence showing employer's control of mode of work of hauling clay for brick manufacturing *held* to support finding that deceased when killed was not an independent contractor, but an "employee," as defined in Acts 35th Leg. c. 103, pt. 4, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82); it being assumed that the statutory definition does not distinguish an "employee" from a "servant" at common law, as distinguished from independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from District Court, Henderson County; Jno. S. Prince, Judge.

Proceedings under the Workmen's Compensation Law by Mrs. Talitha Prater and another to recover for death of O. L. Prater, employee opposed by the Western Indemnity Company. The Indemnity Company sued to set aside the award for claimants, and from judgment denying it relief and awarding recovery to claimants according to findings of the Industrial Accident Board, the Indemnity Company appeals. Affirmed.

This suit was brought as provided by section 5, pt. 2, of the Workmen's Compensation Law (Acts 33d Leg. c. 179), as amended by the Act of March 28, 1917 (General Laws, p. 269 [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44]), to set aside an award based on findings of the Industrial Accident Board as follows: (1) That the Athens Pottery Company on August 21, 1917, "was a subscriber to the Employers' Liability Act," and carried a policy of insurance with appellant; (2) that on said day O. L. Prater was in the employ of said

*Decision rendered, June 3, 1919. Rehearing denied June 12, 1919. 213 S. W. Rep. 355.

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pottery company, and as its employee "was covered by said policy of insurance"; (3) that on said day, "while in the course of his employment, said Prater sustained injuries resulting in his death"; (4) that the "average weekly wage of the said O. L. Prater at the time and prior to sustaining said injuries was $14.92; (5) that Mrs. Talitha Prater, widow of said O. L. Prater, and Harry Prater, his minor son, as his "legal beneficiaries, were entitled to receive of and from the Western Indemnity Company a weekly compensation of $8.65 for the death of said O. L. Prater for a period of 360 weeks, beginning August 21, 1917." The ground upon which appellant sought to have the award set aside was that said O. L. Prater at the time he was injured was not an employee of said pottery company, and "was not covered by said policy of insurance as such employee or in any other capacity." It appeared from testimony before the court that the pottery company obtained clay it used in its business of making jugs, etc., from a pit about half a mile from its plant. The company employed four or five men with teams to haul the clay, paying them 36 cents per ton for the service. O. L. Prater was one of the men employed, and had been engaged in the work during about a year before August 21, 1917, when he was killed. He did not himself always drive the team he used, but hired a man to drive it during part of the time. He had nothing to do with mining or excavating the clay. It was mined by men employed by the pottery company for the purpose. Those men, or others employed by the pottery company, loaded or assisted Prater as they did other haulers, in loading the clay on his wagon. He unloaded same without assistance at places the company designated at its plant. It was while his wagon was being loaded at the pit that the clay caved in on him so injuring him as to cause him to die a short time thereafter. A man named Hunt was the pottery company's foreman at the pit, and as such hired Prater to haul clay. Hunt testified:

"Mr. Prater and the other hands employed like him loaded their wagons or had them loaded under my specific directions. They were liable to be discharged at any time for misconduct. They were supposed to do what I wanted them to do or be discharged. They were just to do what I said. All of those hands that worked at that place did what I said. I done the hiring of the men. * * * Sometimes Mr. Prater drove himself, and then again he would have a hand. * * * I done the hiring and run that part of the business right there. The extent of my business there was to direct them where to get the clay, tell them what to do, show them what to do. Mr. Prater had something else to do except to haul clay. He had to do what I told him to. If I didn't want him to haul clay, I would put him at something else. I had them scraping, had them plowing, and had them doing lots of things. I didn't have Mr. Prater doing other things, just hauling clay, the day he was killed. But all of them does scrape, plow, anything I say for them to do. I hired Mr. Prater to haul clay. He was to get 36 cents per ton for hauling clay. When I wanted him to do anything else, I paid him 30 cents an hour for it, paid him 30 cents an hour for his team and driver. * * * Mr. Prater didn't keep a driver all of the time, but he usually kept a driver. * * * If the driver didn't suit, I would send him back home. * * * I had nothing to do with the driver, except if an incompetent driver was sent I stopped him. If they sent a man that wouldn't do a day's work, we didn't have anything to do with him. As to its being a fact that Mr. Prater could work or lay off a day or two if he wanted to they always asked me if they wanted to lay off. If we wanted them to haul, they hauled, and if they don't want to haul, they stay at home. We have got to have it hauled. We wouldn't keep one in our employ that did insufficient work."

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The appeal by the indemnity company is from a judgment denying it the relief it sought, and awarding Mrs. Prater, for herself and as guardian of said minor, a recovery in accordance with the findings of said accident board.

W. R. Bishop, of Athens, and Carden, Starling, Carden, Hemphill & Wallace, of Dallas, for appellant.

A. B. Watkins, of Athens, for appellees.

WILSON, C. J. (after stating the facts as above). The assignments present only this question: Did the testimony warrant the finding that O L. Prater was an "employee" of the Athens Pottery Company within the meaning of the Workmen's Compensation Law, and engaged in service as such at the time he was killed? Appellant's contention if sustained, would require the question to be answered in the negative, for it insists it appeared from "the undisputed evidence that the deceased at the time of his death was acting as an independent contractor, and not as an employee."

In the law referred to (Acts 1917, p. 291 [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82]) the word "employee" as used therein is declared to mean:

"Every person in the service of another under any contract of hire, * * * except one whose employment is not in the usual course of trade, business, profession, or occupation of his employer."

In deciding the question it will be assumed that the definition in the statute does not distinguish the "employee" to which it applies from a "servant" at common law, and therefore that the distinction made by that law between a "servant" and an "independent contractor" applies in the case. Litts v. Lumber Co. (N. Y.) 120 N. E. 730.

"The main test," says Mr. Bailey (1 Master & Servant, p. 170), "in determining whether one is an independent contractor or merely a servant, is whether the employer has the right to control the mode of doing the work. Ordinarily, if the employer retains control, the relation is that of master and servant rather than of contractee and contractor; but if the employee has the right of control he is generally an independent contractor."

"Only such an employee," said the court in Moore v. Kopplin, 135 S. W. 1033, "as is free to do the work he is employed to do in his own way without directions, orders, let, or hindrance from his employer, being responsible to him only for the result, is regarded as" an independent "contractor. In other words, he must be independent and free from the control of his employer."

It cannot be denied that much of the testimony tended to show that Prater, while hauling the clay, was free from control by the pottery company; but we think enough of it was to the contrary of that view to warrant the finding in question.

It will be noted that it appeared from testimony referred to, or set out, in the statement above, that Prater was hired by Foreman Hunt and was "supposed to do what Hunt wanted him to do or be discharged"; that the company had a right to tell him when to begin and when to quit hauling, and that, if Hunt "didn't want him to haul clay" he would "put him at something else"; that Hunt directed him where to get clay, and his wagon was loaded under "specific directions" from Hunt; that he unloaded the clay at places designated by the company; that, while he at times hired a man to drive his wagon instead of driving it himself, if the man he hired was incompetent or did not suit Hunt, Hunt "would send him back home"; and that he always asked Hunt if he "wanted to lay off."

When the testimony pointed out is considered with reference to

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the test recognized by the authorities and stated by Mr. Bailey in the excerpt above, we think it must be held to have been sufficient to support finding that Prater at the time in question was not an independent contractor, but was an employee of the pottery company. If that testimony was true, the pottery company had "the right to control the mode of doing the work" Prater was engaged in doing at the time he was killed. For cases with facts similar to the facts shown by the testimony above referred to in which similar conclusions were reached, see Van Simaeys v. George R. Cook Co., 201 Mich. 540, 167 N. W. 925; Tuttle v. Lumber Co., 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664.

The judgment is affirmed.

SUPREME COURT OF WASHINGTON.

FOSTER

v.

INDUSTRIAL INSURANCE COMMISSION. (No. 15218.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —AMOUNT OF COMPENSATION—REVIEW.

Award of $150 for permanent partial disability from the loss of a finger amputated at the distal joint, an injury not specified in Laws 1917, p. 81, § 1, subd. f, made according to schedule adopted by Industrial Accident Commission fixing compensation in proportion to compensation for the injuries specified in the statute, *held* not a capricious and arbitrary award reviewable on appeal under Rem. Code 1915, § 6604-20, notwithstanding circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —VALIDITY OF AWARD.

That award was made by only one of the industrial accident commissioners, instead of three, does not affect its validity, where it was made from schedule regularly adopted by the commission as a whole.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceedings for compensation under the Industrial Insurance Act by Mrs. Ethel Foster. From judgment of superior court setting aside award of Industrial Insurance Commission, the commission appeals. Reversed, and decision of commission affirmed.

W. V. Tanner and D. E. Twitchell, both of Olympia, for appellant.
Walter S. Fulton, of Seattle, for respondent.

HOLCOMB, C. J. On the 26th day of April, 1918, respondent filed with the Industrial Insurance Commission her claim for compensation,

*Decision rendered, June 12, 1919. 181 Pac. Rep. 912.

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alleging that on the 22d day of April 1918, while engaged in an extra hazardous occupation in the city of Seattle, King county, Wash., she sustained an injury which resulted in the amputation of the middle finger of the left hand at the distal joint (that being the joint nearest the finger nail) and a laceration about an inch long over the dorsal surface of her ring finger of the left hand. Her injury was classified by the commission as a "permanent partial disability" of the affected area, who awarded her the sum of $48.45 for time lost and the further sum of $150 for the permanent partial disability. Dissatisfied with the amount of the award, respondent thereupon appealed from the ruling of the commission to the superior court for King county; her appeal being heard on September 18, 1918. At the close of respondent's testimony, the appellant moved to dismiss the appeal, which motion was denied, and, after hearing respondent's evidence, judgment was entered reversing the action of the commission, setting aside the award of the commission, and remanding the claim to the commission with directions to pay the claimant the sum of $400, together with her costs, and allowing an attorney's fee of $25. From the lower court's action the commission brings this appeal.

The question of fact as to the injury being undisputed, the cause presents several questions of law for our determination. The theory of the appeal basically, is that the award of the commission is inadequate as compensation for the injury sustained. We can readily understand and sympathize with the vigorous protest of his honor the trial judge, for we also regard the award as pitifully inadequate; but, as we shall see, the correction of such insufficiency is neither with the courts nor with the commission, but must be remedied by the legislative function of the state alone. The Industrial Insurance Act is not one designed to award full compensation to each individual for all such damages as such individual would be entitled to in his peculiar circumstances, but is only a system of limited insurance whereby all industrial employees within the statute are paid definite but limited amounts for injuries without regard, as we have said, to the particular individual circumstances or needs of the injured employee. The injury alone is the subject which can be considered by the commission under the statute, and applies to and covers all classes of injuries alike.

To consider, now, the first proposition presented for our determination: Section 6604—20, Rem. Code 1915, is very definite as to the matter of appeal from the award of the commission to the superior court:

"Any * * * workman * * * or person feeling aggrieved at any decision of the department * * * may have the same reviewed by * * * an appeal * * * in so far as such decision rests upon questions of fact, * * * it being the intent that matters resting in the discretion of the department shall not be subject to review. * * * In all court proceedings under or pursuant to this act the decision of the department shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."

To the limitation of appeal made in this statute, this court has suggested the qualification that an award might be reviewed by the courts were the commission charged with "capricious or arbitrary action in fixing the amount of their award." Sinnes v. Daggett, 80 Wash. 677, 142 Pac. 5. The respondent, feeling aggrieved at the inadequacy of the award, based her appeal therefrom upon the alleged "capricious and arbitrary action" of the commission manifested in two ways: First, in the method it has adopted of scheduling the amount of compensation to be awarded any given injury; and, second, upon the fact that in this particular instance the award was made by a single member of the commission instead of by all three members.

Has the superior court authority to declare that the system of awards

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as practiced by the commission is capricious and arbitrary? For this is practically what the superior court in this case has done by substituting its award for that of the commission.

The question may be answered by a reference to the statute. Subdivision "f" of section 1 of chapter 28, Laws 1917, provides, in part:

"* * * For the permanent partial disabilities here specifically described, the injured workman shall receive compensation as follows:

"Loss of one leg amputated so near the hip that an artificial limb cannot be worn, $2,000.00.

"Loss of one leg at or above the knee so that an artificial limb can be worn $1,900.00.

"Loss of one leg below the knee, $1,300.00.

"Loss of the major arm at or above the elbow, $1,900.00.

"Loss of the major hand at wrist, $1,600.00.

* * * * * * *

"Compensation for any other permanent partial disability shall be in the proportion which the extent of such other disability shall bear to that permanent partial disability above specified which most closely resembles and approximates in degree of disability such other disability, but not in any case to exceed the sum of two thousand dollars ($2,000.00)."

[1] Under this statute, the claimant receives compensation for his injury irrespective of his earning ability and irrespective of any other thing except the loss which he has sustained. Appellant introduced in evidence a schedule it has adopted by means of which any given loss, for instance that of the finger, receives a certain definite award, determined by a system of "degree" classifications; injuries not specified by the statute being therein proportionately related to injuries specified by the statute. The respondent was awarded compensation according to this schedule.

It will be seen from the statute that the commission is limited to merely arranging a schedule within limitations carefully laid down. Not only is a total sum prescribed for a specified loss, but, where an injury is not one of those so specified in the statute, the commission is ordered to make an award proportionate to the award specified "which most closely resembles and approximates in degree of disability such other disability" (that is, a specified disability). Of course, under this statute the courts have authority to determine whether or not a schedule adopted by the commission for unspecified injuries is properly proportionate to the most closely related specified injury. That question is not raised in this action.

Obviously, a superior court cannot say that an award made from a schedule so defined and limited by law as is this and of so universal and uniform application is a capricious and arbitrary one; an inadequate one, as in this instance it is, but inadequacy is not synonymous with capriciousness.

The extent and nature of an injury is a matter, of course, for competent medical knowledge to determine. But, as we have indicated, there is no question as to the injury itself; the physician of respondent does not take issue with the physician of appellant who classified the injury.

[2] The question then remains: Was the fact that the award was made by one commissioner instead of three an irregularity sufficient to justify reversing the award? We, of course, agree with respondent's contention that, respecting plural boards and commissions, generally speaking, "the law contemplates that all will meet together so that the public will have the benefit of their combined judgment and discussion." Mechem on Public Officers, § 577. But it is almost to reduce that principle to an absurdity to claim that it applies to ministerial acts merely following an agreed and prescribed course of procedure. The commission by adopting the schedule of awards had, as to an injury

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determined by competent medical knowledge to be within a given degree of the schedule, precluded any necessity for "the combined judgment and discussion" of the whole commission on each or any individual award. The fixing of the degree fixed the amount of the award. The one member of the commission in this case merely declared the amount of award allowed by the schedule for an injury such as was certified to the commission by the commission's physician, nor could the commission collectively have done more or less.

The respondent says:

"Had the Legislature intended that a fixed and arbitrary schedule should be applied in the awarding of compensation, it would have embodied it in the compensation act."

As we read the statute, this is precisely what the Legislature did design namely, to insure that the commission would fix a definite and uniform schedule. We have seen how under subdivision f, § 1, c. 28, Laws 1917, the more common injuries resulting in permanent partial disabilities are specifically set forth and compensated for in exact sums; and for those not therein set forth a very definite principle of compensation is provided, as we have seen, on the proportionate rating of the unspecified injury to the specified injury which "most closely resembles and approximates it." In view of the myriad possibilities of human injuries, this is as definite and comprehensive as a statute could well be.

The judgment of the lower court is reversed, and the decision of the commission affirmed.

Mount and Parker, JJ., concur.

Fullerton, J., concurs in the result.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

ROBERTS

v.

UNITED FUEL GAS CO. (No. 3668.)*

3. COMMERCE—MASTER AND SERVANT—PIPE LINE—WORKMEN'S COMPENSATION ACT—WORK SUBJECT TO PROVISIONS OF ACT—LIABILITY—DEFENSES.

Excavation of a ditch by an interstate pipe line company, preparatory to laying a gas pipe, parallel to one of its existing main lines and to be connected therewith, for the purpose of increasing its carrying capacity, is no part of its commercial business, but is work clearly separable and distinguishable therefrom and in the performance thereof such company is subject, unconditionally, to the provisions of the Workmen's Compensation Act (Laws 1915, c. 9), and, if in default, is liable for injury to its servants employed in such work, caused by the negligence of a fellow servant, and is denied the right of the common-law defenses of fellow servant, assumption of risk, and contributory negligence.

(For other cases, see Commerce, Dec. Dig. § 16; Master and Servant, Dec. Dig. § 356.)

*Decision rendered, May 27, 1919. 99 S. E. Rep. 549. Syllabus by the Court

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Error to Circuit Court, Roane County.

Action by Troy Roberts, by next friend, against the United Fuel Gas Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. G. Altizer, of Charleston, and C. C. Douthitt and Pendleton, Mathews & Bell, all of Spencer, for plaintiff in error.

Thos. P. Ryan, of Spencer, and Chas. E. Hogg, of Point Pleasant, for defendant in error.

WILLIAMS, J. Plaintiff, a minor 19 years of age, suing by next friend for damages on account of personal injury, caused by the alleged negligence of a fellow servant, recovered judgment against the defendant, by whom he was employed as a common laborer, and it is prosecuting this writ of error.

Defendant is a corporation engaged in producing natural gas and transporting it through pipe lines to its customers both within and without the state, and is therefore engaged in both intrastate and interstate commerce. It does not maintain separate pipe lines for the two kinds of commerce, but transports the gas for both domestic and foreign consumption through the same lines to certain points. where so much as is intended for use within the state is carried from the main line, by means of lateral lines, to the places of consumption. Its commercial business is therefore so mingled as not to be clearly distinguishable, the domestic from the foreign. It employed plaintiff about the digging of a ditch about 2½ or 3 miles in length, preparatory to laying a pipe line from its compressor station at Clarence, to connect with the main line leading from that point to Ravenswood on the Ohio river. This new line was parallel to the main line already existing and was intended to increase defendant's carrying capacity between the same points. The main line supplied gas to the towns of Ripley and Ravenswood in West Virginia, and what was not consumed by these towns was turned over at Ravenswood to the Ohio Fuel Supply Company for consumption in Ohio, and was measured in the line as it flowed through the station. Defendant ceased to pay its quota or assessment into the Workmen's Compensation Fund in April, 1915, and was in default at the time of plaintiff's injury which occurred on the 6th of the following August.

Plaintiff's employment required him to gather the tools used by the workmen in the ditch when they became dull, carry them to the blacksmith shop for repair, and redistribute them along the ditch after they were sharpened On the day of his injury he took some tools to the shop and was watching the blacksmith and hi helper while they were sharpening a drill. They were about to cut off the sharp corners of a drill with a cold chisel and sledgehammer, the drill and chisel being held in place on the anvil by the blacksmith, and his helper striking the chisel with the hammer, and the blacksmith told plaintiff to get back out of the way, that a piece of steel might fly off and strike him in the eye. Plaintiff says he immediately started to get out of the way, and, before he had time to do so. the helper struck the chisel an unusually hard blow, causing a small bit of hot steel to fly off from the drill and strike him in the eye, lacerating the ball so severely that it became necessary for him to go to a hospital and have his eye removed, which he did.

[1] The first error defendant assigns is the overruling of its demurrer to plaintiff's first and second amended declarations. Its counsel insist that the original declaration avers plaintiff's injury was recelved while he was working on a pipe line which was used in both interstate and intrastate commerce, and because the two were inseparable, stated no cause of action; defendant in such case not being liable for an injury caused by the negligence of a fellow servant, citing Barnett v.

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Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150, and Suttle v. Hope Natural Gas Co., 97 S. E. 429; whereas, in his two amended declarations he averred his injury was received while he was engaged in work for defendant, which was wholly intrastate, thus, as counsel insist, departing from the original cause of action, citing Findley v. Coal & Coke Ry. Co., 76 W. Va. 747, 87 S. E. 198. Each of the amended declarations, which are not materially different in substance, states a good cause of action, and the demurrers thereto were properly overruled. Objection on the ground that the amendment constituted a departure from the original cause of action, or because it introduced a new and different cause of action, was not made, and the question does not arise on demurrer. 31 Cyc. 463. Where plaintiff files an amended declaration, making no reference to the original, the original is considered as abandoned. Bartley v. Western Maryland Ry. Co., 81 W. Va. 795, 95 S. E. 443; Shafer v. Security Trust Co., 82 W. Va. 618, 97 S. E. 290; Roderick v. Railway Co., 7 W. Va. 54. Hence the demurrer goes only to the sufficiency of the averments in the amended declaration. Railway Co. v. Sutherland, 105 Va. 545, 54 S. E. 465. The question should be raised by objecting to the filing of the amended declaration or by motion to exclude it. Authorities supra. But no objection was here made. The court had overruled the demurrer to the original declaration and permitted plaintiff, on his own motion, to amend, as he had a right to do, and the cause was remanded to rules for that purpose. The amended declaration incorporates no part of the original, nor makes any reference to it; hence a demurrer could not raise the question. However, there is no departure; the amendment preserves the identity of the original cause of action. It shows plaintiff was injured while engaged in the same service, in the same manner and on the same occasion as alleged in the original declaration, the only difference being that the amended declaration states with greater particularity the character of the work defendant was then doing and the nature of plaintiff's employment therein; and in both the original and amended declarations the cause of action averred arises under the laws of the state of West Virginia. Hence, the case is unlike Findley v. Coal & Coke Ry. Co., supra, where the plaintiff brought his action under the state law, and, after the evidence introduced at the trial had so far developed the facts as to render it apparent that his right of action was determinable according to the federal Employers' Liability Act, sought to amend his declaration in order to make it conform to the requirements of that act, and the amendment stated a different ground or basis of action, and was therefore an averment of an entirely new cause of action. But here there is no such departure, and the amendment was proper.

[2] The next complaint is that the court improperly overruled defendant's motion to discharge the jury from further considering the case, on account of certain improper remarks made in their presence and hearing by one of counsel for plaintiff after they had been impaneled and sworn, which, it is claimed, were evidently intended to prejudice the minds of the jury against defendant and prevent a fair and impartial verdict. In the progress of the trial Thomas P. Ryan, one of plaintiff's counsel, arose and in the presence and hearing of the jury said:

"I want to call the court's attention to the fact that I am just informed that an employee of the United Fuel Gas Company, the defendant in this suit, has a list of jurors at this time, and has been insisting on their going to his home, and wanting them to say what they think of the United Fuel Gas Company, and what they think of the case now on trial; and this is not all, there are other things being done that are improper."

Counsel insist that such statement was extremely prejudicial, and was made for the purpose of inducing the jury to believe that de-

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fendant, through its agents, was endeavoring in some improper manner to influence them to render a verdict in its favor, and thereby to cause a revulsion in their minds from defendant and render them less capable of considering the case fairly and impartially. We do not hesitate to express our disapproval of such conduct on the part of counsel. It was highly improper and unprofessional, and, so far as the record discloses, was wholly without justification or excuse. But it is not just that litigants should be made to suffer for the indecorous remarks and unprofessional conduct of their counsel, and unless the court can see that the jury were in fact improperly swayed or influenced thereby, it is not cause for reversal. The trial court, by a proper instruction to the jury, told them to disregard said remarks and not to allow their minds to be influenced thereby, but to decide the case impartially, solely according to the evidence, and did all in its power to correct the wrong. State v. Huff, 80 W. Va. 468, 92 S. E. 681; State v. Alie, 82 W. Va. 601, 96 S. E. 1011; 4 Encyc. L. & P 451.

[3, 4] The next complaint is that the court erroneously gave plaintiff's instructions Nos. 1 and 2 to the jury. In substance and legal effect they are the same, the only difference being in phraseology. The first informed the jury that, if they believed from the evidence that at the time of plaintiff's injury he was employed by defendant, and it was then engaged in both interstate and intrastate commerce, and that the work in which plaintiff was engaged was done in the state of West Virginia, while defendant was engaged in intrastate commerce therein and such intrastate commerce was clearly separable and distinguishable from the interstate work in which defendant was also engaged, then they were informed that, as to the work in which plaintiff was then engaged, defendant was subject to the Workmen's Compensation Act (Laws 1915, c. 9) and, not having availed itself of the provisions thereof, could not rely upon the defenses of contributory negligence, assumption of risk, or the negligence of a fellow servant.

Because there was no conflict in the evidence respecting the character of business in which defendant was engaged, or in the character of work in which plaintiff was employed at the time of his injury, counsel insist that the question whether defendant was subject to the Workmen's Compensation Act was one of law for the court, and was therefore erroneously submitted to the jury. Generally it is error to submit unmixed questions of law to the jury for their decision, but if the court does so, and the jury happens to decide them correctly, a party is not thereby prejudiced and cannot complain. Runnion v. Morrison. 71 W. Va. 254, 76 S. E. 457.

Defendant's default being admitted, and the other facts submitted to the jury by the instructions being proven and not denied, the real question presented was one of unmixed law for the court, which is this: Was the work of digging the ditch preparatory to laying a new pipe line which was to become, when completed, a part of defendant's transportation system, a work that is clearly separable and distinguishable from its interstate work? The question is answered by previous decisions of this court. Suttle v. Hope Natural Gas Co., supra; Barnett v. Coal & Coke Ry. Co., supra; McKee, Adm'r, v. Ohio Valley Electric Ry, Co., 78 W. Va. 131, 88 S. E. 616. The work of excavating the ditch was purely construction work within the state, and was clearly separable and distinguishable from defendant's commercial business. The pipe line to be laid in the ditch was no part of defendant's means or appliance for carrying on either intrastate or interstate commerce, nor could it become such until the pipe was laid. This is altogether unlike a case where an employee is injured while engaged in repairing an existing means or appliance already devoted to a commercial purpose, as, for instance, the work of repairing an existing railroad track, bridge or depot, which is already devoted to commerce. In the McKee Case

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plaintiff's intestate was killed by the falling in of the earth upon him while he was making an excavation for the foundation of an abutment for a new bridge, which was intended to take the place of an old one then in use, and we there held the work he was doing was separate and distinct from commerce. In the Suttle Case, plaintiff's intestate was killed while assisting in the erection of a derrick over a gas well, preparatory to cleaning out the well in order to accelerate the flow of gas which was intended for both intrastate and interstate commerce, and it was held that such work was not connected with commerce. But in the Barnett Case plaintiff's intestate was employed in transportation work, and the intrastate and interstate features of it were not clearly separable, and because of the provisions of section 52 of the Workmen's Compensation Act, relating to employees engaged in both intrastate and interstate work, making as to them a limited application of the provisions and penalties of the act, it was held that the act did not apply in the particular instance. But that case is clearly distinguishable from the present one. Here the work in which plaintiff was employed is wholly separable and distinguishable from defendant's interstate business, and, in such case, the provisions of the act are applicable to defendant. Section 52 expressly says the act shall apply to an employer engaged in interstate commerce "to the extent that his mutual connection with the work in this state is clearly separable and distinguishable from his interstate work," and to that extent the act applies unconditionally.

In construing the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]) to determine whether an employee was, at the time of his injury, engaged in interstate transportation, the Supreme Court of the United States holds that the test is:

"Was the employee, at the time of the injury, engaged in transportation or in work so closely related to it as to be practically a part of it?" Shanks v. Delaware, etc., R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; New York Cent. R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

In the Shanks Case it appears that he was employed in a railroad machine shop, and his work generally consisted in repairing certain parts of locomotives which were used in both intrastate and interstate transportation, but on the day of his injury he was solely engaged in taking down and putting into a new position an overhead shaft, one of the shop fixtures, and it was held he was not then engaged in interstate transportation within the meaning of the act. In the White Case, plaintiff's intestate was a night watchman in the employ of the railroad company, and his duty was to guard tools and materials intended for use in the construction of a new station and new tracks upon a line of interstate railroad. He received an injury which resulted in his death, while performing his prescribed duties, and the court held that although the fact was admitted that the new station and tracks were designed for use in interstate commerce when finished, it did not bring the case within the federal Employers' Liability Act. This case is very similar to the one under consideration. The difference between the character of the construction work in the two cases does not differentiate them. In Bravis v. Chicago, etc., R. R. Co., 217 Fed. 234, 133 C. C. A. 228, a case decided by the Circuit Court of Appeals, the rule is thus stated:

"An employee engaged in the construction of a bridge, 600 feet distant from a railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged and intends to use the cut-off therein when completed."

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The next point on which counsel rely is the alleged error in refusing defendant's peremptory instruction. It is predicated on the assumption that there is not sufficient evidence to prove actionable negligence. The negligence on which plaintiff relies is the negligence of a fellow servant, and the evidence respecting it is conflicting, but sufficient to support the verdict. By the Workmen's Compensation Act an employer who is in default is rendered liable for the negligence of his servants or agents, and is denied the defenses of fellow servants, contributory negligence, and assumption of risk. In answer to interrogatories propounded to the jury on motion of the defendant, the jury found that, although the blacksmith had warned plaintiff of his danger, he was not given time to get out of the way, and received his injury while attempting to obey the warning.

[5] It is useless to cite authorities for the proposition that $2,500 is not an excessive verdict for the loss of an eye.

Our conclusion is to affirm the judgment.

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UNITED STATES DISTRICT COURT.
S. D. NEW YORK.

THE HOWELL.*

ADMIRALTY—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—EXCLUSIVE REMEDY—ADMIRALTY JURISDICTION.

Under Judicial Code, § 24 (3), and section 256 (3), as amended by Act Oct. 6, 1917, §§ 1, 2 (Comp. St 1918, §§ 991, 1233), by addition of the words "saving * * * to claimants the rights and remedies under the Workmen's Compensation Law of any state," which amendments are constitutional, a longshoreman injured on a vessel whose employment is covered by the Workmen's Compensation Law of New York, which makes the remedy thereunder exclusive, is without remedy in admiralty, either in personam or in rem.

(For other cases, see Admiralty, Dec. Dig. § 20.)

In Admiralty. Libel in rem against the steam lighter Howell. Libel dismissed.

This was a libel in rem in the admiralty for personal injuries to the libelant while discharging a lighter in the harbor of New York as a longshoreman. The libelant, being on board the lighter and in the employ of the claimant, was hit by a falling bolt which had worked loose from a shackle used in dicharging her. The libelant's theory of recovery was that the ship was provided with insufficient apparatus, and was or became unseaworthy to that extent. At least it may be taken that the libel alleged facts which were susceptible of that interpretation.

The claimant had taken out the necessary insurance to comply with section 50 of the Workmen's Compensation Law of New York (Consol. Laws, c. 67), under section 11 of which its liability in that event was confined to the compensation fixed by that statute, to the exclusion of any general liability arising from its duty as master to its servants. The question was whether the claimant was equally absolved from any liability arising under the maritime law.

P. J.Dunn, of New York City, for libelant.
B. L. Pettigrew, of New York City, for defendant.

LEARNED HAND, D. J. (after stating the facts as above) The case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, decided that the New York Workmen's Compensation Law was invalid so far as it affected to impose any liabilities for personal injuries occurring in places over which the admiralty courts of the United States had jurisdiction. While the court recognized that the States might modify certain maritime rights, they thought that the action of Congress alone could change the preexisting rules of the sea in respect of such matters as were covered by the law in question. Subsequently Congress changed Judicial Code (Act March 3, 1911, c. 231) § 24, par. 3, and section 256, par. 3, 36 Stat. 1091, 1160, as amended by Act Oct. 6, 1917, c. 97, §§ 1, 2, 40 Stat. 395 (Comp. St. 1918, §§ 991, 1233), by amending t' phrase "saving to suitors in all cases, the right of a common-law remedy where the common law is com-

*Decision rendered, March 6, 1919. 257 Fed. Rep. 578.

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petent to give it," by the addition of the phrase, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." Since, therefore, under Southern Pacific Co. v. Jensen, supra, Congress was held to have exclusive power to prescribe the rules governing accidents at sea, the only questions which can remain after those amendments are as to their meaning, and as to whether they were forbidden by some constitutional limitation.

To take up first the second question, it may be asked whether the act of Congress was valid which submitted the rules of the sea, not only to existing state laws, but to possible future changes determined only by the will of the states. So far as this case goes, that question is perhaps not pertinent, because, although the state of New York in 1918, and after they had been declared invalid, re-enacted the section controlling this case—section 2 (Group 10)—there was no change in language, and the case at bar may be regarded as in fact governed by the law of New York as it stood when the amendments were passed. Nevertheless the amendments were probably intended to be prospective, and a question might arise as to their validity for that reason. Since Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, I can hardly think that that question is serious. That case determined that, as to matters over which Congress had jurisdiction, it might permit state legislation even prospectively until such time as in its own pleasure it should choose to assume explicit legislative control. Hence, even if it be true that the amendments to sections 24 and 256 of the Judicial Code must be interpreted prospectively, there is no ground to suppose that they are invalid.

As to the validity of these amendments to the Judicial Code under the Fifth Amendment to the United States Constitution, I assume that New York Central R. R. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann, Cas. 1917D, 629, is a final answer, since the same question was there presented as to the validity of the state law under the Fourteenth Amendment.

There remains, then, only the meaning of the amendments, which by reference necessarily incorporated into themselves the New York Workmen's Compensation Law, along with other such laws. Section 11 of that law makes the remedy of compensation exclusive, and if the liability sued upon in the libel depended upon the state law, that would be an end of the matter, since it was clearly not the purpose of the state statute to allow any general liability whatever to survive. However, Southern Pacific Co. v. Jensen, supra, went precisely upon the point that such liabilities as those now at bar arise from the law of the sea, independently of the law of the state, and the more recent case of Chelentis v. Luckenbach, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, confirms that view. Hence, as the libelant urges, the state law may not be interpreted as attempting to end liabilities over which it had no power, and which did not depend upon the will of the state. The answer is, I think, that, though its act was brutum fulmen, the state certainly did intend by section 11 to abolish all liabilities which had previously existed in favor of the groups mentioned in section 2, because section 11 is general and abolishes all liability "at common law or otherwise." Were it not so, we must suppose that the state law, which confers compensation upon longshoremen by a single sentence, whether at work, afloat or ashore, intended to give them an option if injured while afloat, and none if injured while ashore. The words do not suggest such an interpretation, and the result is incredible. The system was, of course, intended to be uniform throughout.

Now, it is true that, when first used, this language did not have the force of law as widely as was expected by the Legislature which used it. But that did not affect the content of the language; i. e., its actual intent. That is a question of fact, which is not in the least

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affected by whether or not the intent became a binding rule of law. When Congress gave validity to the language, it necessarily adopted the intent with which it was used, and the words which in fact had all the time covered such a liability as this, as a mere expression of intent, thereafter covered it as a law. Therefore Congress abolished such liabilities as those here in suit.

It is finally suggested that the remedy in rem may still exist in the admiralty concurrently with the remedy of the Workmen's Compensation Law, since the state law could not have interfered with a remedy known only to the admiralty. This was undoubtedly the suggestion of the Court of Appeals of the State of New York in Walker v. Clyde S. S. Co., 215 N. Y. 529, 532, 109 N. E. 604, Ann. Cas. 1916B, 87, a case subsequently reversed by the Supreme Court in Clyde v. Walker, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116. I submit with deference that in no event can the remedy apply after Congress passed the amendments to the Judicial Code. The remedy in rem must depend up some obligation created by the negligent act of the ship. As soon as that obligation ceases, the remedy is necessarily in vacuo. As I have said, the state law (section 11) did not confine itself to the abolition of common-law liabilities, but professed to abolish all such anywhere. If it was effective to do this, after Congress had validated its intent, there was thereafter no liability, and the remedy in rem had nothing further on which to operate. While it is true, therefore, that the state law, even when so validated, did not and could not affect any remedy of the admiralty, the underlying obligation having disappeared, the remedy was inoperative. I am not, therefore, troubled by the language of Walker v. Clyde S. S. Co., supra.

The libel is dismissed, with costs.

SUPREME COURT OF CALIFORNIA.

TEMESCAL ROCK CO. ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (L. A. 6036.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"DEPENDENT"—COMMON-LAW WIFE.

A woman who in good faith lived with an employee as his lawful wife, believing that their marriage license in itself constituted marriage, *held* entitled to recover for his death, as a "dependent" member of his household within Workmen's Compensation Act 1917, § 14, notwithstanding the 1895 amendment to Civ. Code, § 55, requiring solemnization of marriage.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

In Bank.

Proceeding under the Workmen's Compe..sation Act by Dolores Rodriguez, otherwise known as Dolores Lopez, againt the Temescal Rock

*Decision rendered, June 24, 1919. Rehearing Denied July 24, 1919. 182 Pac. Rep. 447.

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Company, employer, and Ocean Accident & Guaranty Corporation, insurance carrier, to recover compensation for death of Silviano Lopez, employee. Award in favor of claimant, and the employer and insurance carrier apply for writ of review against the Industrial Accident Commission and claimant. Award affirmed.

George H. Moore, of Los Angeles, for petitioners.
A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondent Commission.
Walter S. Claysor, of Corona, for respondent Dolores Rodriguez.

SHAW, J. This is a proceeding to review a judgment of the Industrial Accident Commission awarding compensation to Dolores Rodriguez otherwise known as Dolores Lopez, on account of the death of one Silviano Lopez. The death was caused by accidental injuries to Silviano Lopez occurring on July 23, 1918, while he was in the employment of the Temescal Rock Company, which injuries arose out of said employment. The award was made against Ocean Accident & Guaranty Corporation, the insurance carrier of the rock company. It was made to Dolores Rodriguez on the ground that at the time of the accident he was wholly dependent for support upon said Lopez. The sole objection thereto is the claim that upon the evidence and the findings of the commission she was not dependent upon Lopez for support, within the meaning of section 14 of the Workmen's Commission Act of 1917 (Stats. 1917, p. 844).

It is conceded that she was, as a matter of fact, dependent upon him for support and was being supported by him at the time of the injury. The commission found these facts to be true. The claim is that she cannot be classed as a dependent and is not entitled to compensation for the death of Lopez, because she sustained no legal relation to him, either of blood or marriage, at the time, but that she and the decedent were then living and cohabiting together as husband and wife, notwithstanding the fact that they were never married. Upon this question the commission found, upon sufficient evidence, that she and Lopez were ignorant persons, unacquainted with our laws or with the legal requirement of marriage; that on June 5, 1918, they had agreed to intermarry, and in pursuance of such agreement procured from the county clerk of Riverside county a marriage license authorizing their marriage; that they in good faith then believed that said license was sufficient to constitute in itself a lawful marriage; that thereupon they assumed the relation of husband and wife and cohabited together in the same dwelling, holding themselves out as husband and wife, the husband providing for their support until the time of said accident; and that during all that time Dolores Rodriguez believed herself to be the lawful wife of Lopez and continued to be in good faith a member of his household and wholly dependent upon him for her support.

The provisions of section 14, aforesaid, relating to this subject are as follows:

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceaed employee:

"(1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death.

"(2) (This clause specifies the children who are deemed to be dependent and is not important to the present case.)

"(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee.

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"(c) No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee, or unless such person bears to such employee the relation of husband or wife, child, posthumous child, adopted child or stepchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece.

Dolores Rodriguez does not come within the provisions of subdivision 1 of subsection (a). That part of the subsection includes only those who stand in the relation of husband and wife. Its language necessarily implies that the relation must be lawful, and therefore it excludes persons who, though not lawfully married, live together believing themselves to be husband and wife.

Subsection (b), however, clearly empowers the commission to inquire into the actual conditions of dependency and to ascertain whether or not the applicant was in fact dependent upon the decedent for support at the time of the injury, and finding such dependency complete or partial, thereupon to award compensation accordingly. Standing alone, this clause would authorize compensation to any person, regardless of relationship or place of abode. But it is expressly qualified and limited in these particulars by the provision of subsection (c). The latter attaches two conditions to the powers given by subsection (b). The first one is that the person claiming to be a dependent must be "in good faith a member of the family or household of such employee." The facts found bring Dolores Rodriguez within these conditions. Lopez had a dwelling house and a household, consisting of himself and said Dolores. She was a member of that household. Both the findings and evidence show that she was living there and was such member in the utmost good faith, believing that she was the lawful wife of Lopez. The conditions are fully met by the facts.

The second limitation of subsection (c) applies to dependents to the employee who may not be members of his family, or household, but who are related to him by blood or marriage or by adoption in some one of the degrees there specified. The two classes of limitations are stated in the alternative, being connected by the disjunctive particle "or." The result is that the law does not require that the person found to be actually dependent under subsection (b) shall come within both classes of the limitations specified in subsection (c), but that such person may be awarded compensation if he or she comes within either class. If the applicant is a member of the family or household of such employee in good faith, compensation may be awarded although he or she may not bear any relation by adoption, blood, or marriage to the employee. But if it appears that the applicant bears either of the relations specified in the second part of subsection (c) although not a member of the family or of the household, compensation may be awarded according to the degree of dependency. It is not infrequently the case that a person bearing some one of such relations to another is living apart as a member of a different family or household. The second qualification in subsection (c) was intended to cover persons of this class.

The petitioners argue that to allow compensation to one whose only claim to dependency arises from an illegal cohabitation with the employee, ostensibly as his wife, would be a gross violation of morals and of the express policy of our law, and, furthermore, that one living in such forbidden and criminal relations with another cannot in law be deemed to be acting in good faith as a member of his household. We think there are satisfactory answers to this argument. At common law Dolores Rodriguez, under the facts found, would have been the lawful wife of Lopez. There was a contract of marriage and assumption of the rights, duties, and obligations of the relation, and an actual consummation thereof. Graham v. Bennet, 2 Cal. 506; Sharon v. Sharon, 75 Cal. 1, 16 Pac.

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345. It was not until after the amendment of 1890 to section 44 of the Civil Code 1895 that a solemnization became essential to the validity of a marriage. Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74. There was nothing essentially or inherently immoral or vicious in the conduct of the parties, if we judge them according to their own understanding and belief. The criminal character of their cohabitation does not come from the fact that they were cohabiting together believing themselves to be husband and wife, although not so, but from the fact that the Legislature, by the statute of 1895, had required an additional ceremony to constitute a legal marriaage. Of this statute they were ignorant, and the immorality of their conduct cannot be judged with reference to it except in a case where the validity of the marriaage is the essential thing to be determined. It was competent for the Legslature, by a subsequent statute, to make that particular requirement to a valid marriage inapplicable in other cases, such for instance, as the determination of the question of dependency necessary to authorize compensation to a person injured by the death of an employee. This it has done by the provisions of section 14, with respect to one who at the time of the injury was in good faith a member of the household of the employee. This statute completely takes away, for that purpose, the immorality of parties who in good faith were living together as Lopez and Dolores Rodriguez were living. It also declares a different public policy with reference to such cases and completely removes the objection that it is not sound policy to allow compensation in such a case.

It is true that if the provision is loosely administered it may give rise to great abuses. Persons consciously living in illicit relations may endeavor to take advantage of the situation for their own gain. But for the proper administration of the law in this respect the state depends upon the Industrial Accident Commission. It will, of course, exercise the greatest care to require strict proof of entire good faith in such cases. There is nothing in the evidence in the present case to indicate that there was any ground for a charge of bad faith in the conduct of the parties at and prior to the time of the accident.

The award is affirmed.

We concur: Angellotti, C. J.; Wilbur, J.; Olney, J.; Melvin, J.; Lawlor, J.

SUPREME COURT OF CALIFORNIA.

OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED,

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 8986.)*

1. MASTER AND SERVANT—WORKMEN,S COMPENSATION ACT—PROCEEDINGS—HEARING—REOPENING CASE.

A case under the Workmen's Compensation Act, heard before a referee without notice to the insurance carrier and without its being represented or given an opportunity for cross-examination, and introduction of testimony, should be reopened unless there is no possibility of changing the result.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

*Decision rendered, May 20, 1919. Rehearing Denied June 19, 1919. 182 Pac. Rep. 35.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ARISING IN "COURSE OF EMPLOYMENT."

An employee of a company, injured in attempting to prevent a child from being run over on its premises by an automobile driven by an officer who was there on the company's business, was injured in the "course of his employment," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1])

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REOPENING CASE—DEPOSITION—LACK OF COUNTER EVIDENCE.

An insurance carrier, which had received no notice of, and was not represented at, the hearing is not entitled to a reopening of the case on the ground that a deposition introduced at the hearing was inadmissible as hearsay, where it did not offer to rebut the matters contained in the deposition.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS—DEPOSITION—ADMISSIBILITY.

The deposition of a physician as to a servant's injuries for which compensation is sought, although hearsay, as to the employer and the insurance carrier who were not parties to the proceeding in which the deposition was taken, is admissible under Workmen's Compensation Act 1917, § 60, subd. a, providing that no award shall be invalidated because of admission of evidence inadmissible under common-law or statutory rules.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

In Bank.

Proceedings by O. N. Nelson against the Sibley Grading & Teaming Company, employer. The Industrial Accident Commission awarded compensation, and the Ocean Accident & Guarantee Corporation, Limited, insurance carrier, petitioned for a writ of review. Writ denied.

Redman & Alexander, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondent Industrial Accident Commission.

Robinson & Brown, of San Francisco, for respondent Nelson.

OLNEY, J. This is a hearing upon an order directed to the Industrial Accident Commission and the respondent Nelson, requiring them to show cause why a writ of review should not be issued annulling an order of the Commission awarding compensation to Nelson for injuries sustained by him in the employ of a corporation known as the Sibley Grading & Teaming Company. The petitioner for the writ, the Ocean Accident & Guarantee Corporation, is the insurance carrier for the Sibley Company, the employer.

The essence of the complaint of the petitioner, both as set forth in its petition, and as presented in argument at the hearing, is: First, that a referee of the commission held a hearing without notice to the petitioner, and without its being represented, at which hearing testimony directly controverting the contention of the petitioner was presented without any opportunity for cross-examination, and that the commission subsequently refused to reopen the case to permit of such cross-examination and the introduction of counter testimony; and, second, that a portion

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of a deposition taken in an action to which neither the petitioner nor the Sibley Company was a party was admitted in evidence before the commission.

[1] The return of the commission to the order to show cause discloses a case where in all fairness, to say the least, the hearing should not have been proceeded with by the referee in the absence of the petitioner or some one representing it. This being true, and the hearing having been nevertheless proceeded with, the commission in its turn should have reopened the matter for such cross-examination or counter testimony as the petitioner might properly desire except upon one contingency, namely, that there was no possibility of such cross-examination or counter testimony changing the result.

In this connection, the return of the commission shows that its order refusing to reopen the case was in fact put upon the ground that upon the facts as contended for by the petitioner the result would be the same, and at the hearing counsel for the commission frankly conceded that unless this were so the award should be annulled and a further hearing had by the commission. The essential question is therefore whether or not a different result might have been arrived at had the petitioner been given an opportunity for cross-examnation and counter testimony.

[2] An examination of the proceedings before the commission shows that the fact of the accident was undisputed, as was also the fact that Nelson was an employee of the Sibley Company. The contentions were: First, as to whether or not the accident occurred to Nelson in the course of his employment; and, second, as to the extent of his injuries. The evidence, other than the deposition, received at the hearing complained of, was concerned with the first question only, and it is as to this question—one as to any liability on the part of the employer—that the possible effect of cross-examination or counter testimony must be considered.

The evidence shows without dispute that Nelson when hurt was at the entrance of the barn of the Sibley Company engaged in stabling a team of the company's horses which he had been driving, and that while so engaged he was struck by an automobile accidentally backed upon him by one Sibley the president of the company. It is contended by the insurance company that the automombile was the property of Sibley personally and not of the Sibley Company; that Sibley was at the barn on his own personal business, or rather for his own pleasure, and not on the business of his company; and that Nelson was hurt in an endeavor to rescue a child which was about to be run over by the backing automobile. From these facts, for which it contends, the insurance company claims that it follows that Nelson was not hurt in the course of employment. For the purposes of this discussion, we must take the foregoing facts as contended for by the insurance company to be true with a single exception. The claim that Sibley, the president of the Sibley Company, was not at the barn on business of the company, is not substantiated by the record and is directly contrary to his own testimony given on behalf of the insurance company. That testimony given under examination by counsel for the insurance company is as follows:

"Q. What brought you to the city that day A. Well, I come to the city quite often on Sundays.

"Q. Just for pleasure? A. Partly pleasure and partly to see how things were going.

"Q. What was the nature of this trip? Did you have any particular duty in the yard that day? A. Nothing particular, just to see how things were going along."

The testimony introduced on behalf of Nelson at the hearing later, when the insurance company was not represented, was not concerned with this phase of the case, but only with the phase as to whether or

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not Nelson was hurt in attempting to rescue a child, and no evidence counter to that above quoted was sought to be introduced by the insurance company. Under these circumstances, the insurance company cannot claim that the fact as to the occasion for Sibley being present at the barn is any more favorable to it than is disclosed by the testimony quoted. That testimony makes it plain that, while Sibley may have come to the city partly for his own pleasure, he was at the barn partly at least on his company's business, to see, as president, "how things were going along."

The utmost, therefore, that the insurance company can properly contend for as the facts, are that Nelson was in the employ of the Sibley Company, that he was at the latter's barn at the time of the accident stabling horses in the course of his employment, and that he was injured in an attempt to rescue a child that was in danger of being run down on the company's premises by an automobile driven by the president of the company, who was there on company business.

We have no hesitation in saying that upon these facts—and, as we have said, they are the most favorable that can be properly contended for by the insurance company—Nelson was injured in the course of his employment. To be sure, he was not employed to rescue children. But certainly it was reasonably within the course of his employment, within the scope of those things which might reasonably be expected of him as an employee, that he should attempt to prevent an accident on his employer's premises, particularly where the employer would not improbably be responsible for the accident. It is not difficult to imagine how summarily the services of an employee would be dispensed with, who, seeing that such an accident was about to happen, held back and did nothing to prevent it on the excuse that it did not come within the scope of his employment. If, in this case, Nelson, instead of being injured in an attempt to prevent a child being run over on his employer's premises by an officer of his employer there on his company's business, had been injured in an attempt to put out an incipient fire accidentally started in the barn, it is hardly possble that any question would have been made. Yet there is no real distinction between the two cases. Nelson was no more employed to put out fires than he was to rescue children. The point is that the danger which threatened, and in attempting to remove which he was hurt, was one which threatened, his employer and directly concerned it, and with which Nelson was confronted in the discharge of his customary duties.

If authorities are needed in support of what seems to us so obvious, we would refer to Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999; Waters v. Taylor, 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347; and United States, etc., Co. v. Industrial Accident Com'n, 174 Cal. 616, 163 Pac. 1013.

It follows that the petitioner was not, in fact, prejudiced by the holding of the hearing in question without the petitioner being present or represented or having an opportunity to be present or represented.

[3] There remains for consideration the matter of the admission in evidence of the deposition. It was taken, as we have said, in an action brought by Nelson to which neither the employer nor the insurance company was a party. As to them it was hearsay and not within any of the exceptions to the hearsay rule. It was the deposition of one Dr. Eaves. A portion only was admitted, and that concerned solely the extent of the injuries suffered by Nelson.

It is also the fact that it was admitted in evidenc at the hearing at which the insurance company was not represented nor given an opportunity to be represented. This last fact, however, is immateral. This would not be true if the insurance company, on learning of the deposition, had asked for permission to introduce counter evidence, and had been refused. If such a request had been made, it certainly should have

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been granted. But the fact is that, while the company petitioned for a reopening of the case to permit it to introduce further testimony, the testimony sought to be introduced was not in rebuttal of the deposition or at all concerned with the only point touched upon by it. This being true, the only thing which the insurance company could have done to better its situation, if it had been represented at the hearing, would have been to have made and reserved an objection to the introduction of the deposition. This it may be considered as having done. The question, therefore, is one simply as to the validity of such objection, or, in other words, as to the admissibility of the depostion.

[4] That the deposition, although hearsay as to the parties against whom it was introduced and not within any exception to the hearsay rule, was yet admissible, is settled by section 60, subdivision a, of the "Workmen's Compensation, Insurance and Safety Act of 1917" (Stats. 1917, p. 831), which reads:

"All hearings and investigations before the commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof, neither the commission nor any member thereof, nor any referee appointed thereby, shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this act. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission; nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure."

It follows that the writ should not issue on either of the grounds advanced, and it is therefore denied.

We concur: Angellotti, C. J.; Lennon, J.; Shaw, J.; Wilbur, J.; Melvin, J.; Lawlor, J.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

SECOND DISTRICT, DIVISION 1.

McADOO, DIRECTOR GENERAL OF RAILROADS,

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (Civ. 2753.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"SERIOUS AND WILLFUL MISCONDUCT."

Machinist helper's omission to use goggles while clipping off burrs formed in the reaming of saddle-bolt holes contrary to rules and specific instructions, merely because he disliked the goggles, was "serious and willful misconduct" within Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831) § 6, subd. 4, reducing compensation

**Decision rendered, April 4, 1919. 181 Pac. Rep. 400.

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to one-half where injury was caused by "serious and willful misconduct" of injured employee, except where injury resulted in death or permanent partial disability equaling 70% of total, or where employer violated law or safety order of commission.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

Petition for certiorari by William G. McAdoo, Director-General of Railroads against Industrial Accident Commission and Robert H. Hogan, to review an order of Industrial Accident Commission awarding to Robert H. Hogan compensation for injuries. Award annulled and case remanded to Industrial Accident Commission for further proceedings with instructions.

Dana T. Smith and E. E. Bennett, both of Los Angeles, for petitioner.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

CONREY, P. J. Certiorari. Pursuant to stipulation, the above-named petitioner has been substituted in place of the original petitioner, Los Angeles & Salt Lake Railroad Company. The writ was issued to review an order of the Industrial Accident Commission, awarding to Robert H. Hogan compensation for injuries received by him while working as an employee of said railroad company. It is conceded that if the injury received by Hogan was caused by his serious and willful misconduct, this court may set aside the award and remand the case to the commission for the reduction of the award to one-half of the amount allowed by the commission.

Section 6 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), in subdivision 4 thereof, reads as follows:

"Where the injury is caused by the serious and willful misconduct of the injured employee, the compensation otherwise recoverable by him shall be reduced one-half: Provided, however, that such misconduct of the employee shall not be a defense to the claim of the dependents of said employee, if the injury results in death, or to the claim of the employee, if the injury results in a permanent partial disability equaling or in excess of seventy per cent. of total: And provided, further, that such misconduct of said employee shall not be a defense where his injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the commission, with reference to the safety of places of employment."

The award in this case is made upon a permanent partial disability equaling 30¼ per cent. of total disability of the right eye.

The accident by which the applicant, R. H. Hogan, was injured, occurred on February 12, 1918, while he was employed as a machinist's helper. He was reaming saddle-bolt holes in a locomotive with an air motor and reamer. The reamer became stuck, and caused a burr to form in the top of the hole. He removed the reamer and chipped the burr off, and a piece of steel glanced off and struck him in the eye. He was not at that time wearing any goggles or other protection to the eyes. He had been employed as a machinist's helper at that place for about four months, and had several years' experience as a workman in other machine shops. At several places in the shop was posted a circular headed "Safety Rules for Shopmen." One of these was:

"Do not do any chipping or grinding without wearing safety goggles. If you are not provided with goggles, go to foreman."

The applicant admitted that he had seen the notices posted, but that he never read them. Nevertheless, it is conceded that he was "familiar

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with the purport" of this rule. He knew that the company provided goggles and that they were to be found in the tool room. The following questions and answers are part o' the testimony of the applicant before the commission:

"Q. Have you ever used any glasses at all? A. I used goggles when I was doing a regular job of chipping Q. You were doing a job of chipping at that time? A. Regular chipping job. This is just an incident of where you pick up a hammer and chisel and knock off a chip, and go right ahead with your regular line of work. Q. You were using a reamer driven by air under pressure? A. Yes. Q. And the reamer stuck in the hole? A. Yes. Q. That raised around the edge of the hole some chips of steel? A. Rough place. Just caused a rough place at the top of the hole. That prevented the reamer from running smoothly. In order to get a smooth surface to start from, I knocked those chips off and for that purpose I picked up a hammer and chisel. It was while using a hammer and chisel that the piece of steel flew into my eye. * * * Q. Had you been given any orders at all as to wearing the glasses when you were engaged in such work as that? A. No, sir."

On cross-examination the applicant admitted that he had on another occasion some cast iron burrs in his eyes and had the clerk of the general foreman remove them. He said that he did not remember that, about an hour before the time when he received his injury for which he seeks to obtain compensation, he got another piece of metal in his eye, and also had it removed by the clerk; also he did not remember that the first of these two incidents occurred on the day preceding the accident in question here, and that the clerk and the general foreman both told him to get goggles and wear them when he was doing work where particles of metal were liable to fly. He testified that he knew that goggles were kept in the tool room to be used by workmen, "if they thought they needed them." After the foreman, Keith, and his clerk, Pauff, had testified fully to both of the incidents referred to in the above-mentioned cross-examination, Hogan gave further testimony. In this later testimony the following occurs:

"Q. You have heard the testimony of Mr. Keith and Mr. Pauff as to your having been in the office the day previous with some foreign body in your eye, have you? A. Yes. Q. Is that testimony correct or incorrect? A. I went in there before this, I don't remember whether that was the exact date or not. Q. Do you know how you got the foreign body in your eyes that was in there at that time? A. Drilling holes in cast iron, and the dust in the air from the exhaust of the motor. Q. You told them that was the way you got it in, did you? A. Yes. Q. And you supposed that was the way? A. I told them I was drilling holes in the saddle—. Q. The morning you received the injury that caused the loss of your eye had you made a previous visit to Mr. Pauff? A. I had been there before with this dust in my eyes, but I don't remember whether that was the morning before or not. Q. How many times were you there? A. There just on this occasion with this cast iron, I remember twice, and he gave me some water, some eye wash to wash it out. Q. Do you recall whether you were there that morning or not? A. I don't remember whether that was the time that I was or not."

It thus appears that there is no definite contradiction of the testimony given by the foreman and clerk on this matter, but rather that silence which gives consent. The job on which Hogan was employed involved the reaming of about 50 of those saddle bolt holes, and included more than one day's work. That the forming of burrs was a common incident of that work is not denied. It was so much expected that Hogan kept by him a hammer and chisel with which to remove the burrs. He voluntarily and intentionally omitted to obtain and use goggles, contrary to rules of which he had knowledge, and contrary to specific instructions, all of

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which were laid down for his protection. The only reasonable explanation is that he disliked the goggles because they were, as he said, "in his way," and so he preferred to take the chance of personal injury. This was willful misconduct and it was serious. The case was in essential elements very similar to that disclosed in Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, where an electric lineman disobeyed a known rule and positive instructions requiring him to wear rubber gloves while handling highpower wires, and in consequence was killed while doing that kind of work without gloves. As the court there said:

"It cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, the knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

The case at bar sharply distinguishes itself from that of Diestelhorst v. Ind. Acc. Com'n, 32 Cal. App. 771, 164 Pac. 44, where the misconduct of the applicant occurred in a moment of thoughtlessness and not with deliberate intention. The commission's finding, that the applicant's injury was not proximately caused by his serious and willful misconduct, is not sustained by the evidence.

Our conclusion is that upon the record produced herein the award to the applicant should have been for only one-half of the amount allowed by the commission, and as to the excess above that amount the commission acted in excess of its powers. The award is annulled, and the case is remanded to the Industrial Accident Commission for further proceedings in accordance with this decision.

We concur: Shaw, J.; James, J.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1.

METROPOLITAN REDWOOD LUMBER CO. ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (Civ. 2912.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES RESULTING FROM QUARREL BETWEEN EMPLOYEES.

Personal injuries to one acting in the capacity of storekeeper, due to a personal attack upon him by a bookkeeper, an employee of equal rank, following a quarrel between them, cannot be made the basis for compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Proceedings for compensation under the Workmen's Compensation Act by Henri Gireaux, employee, opposed by the Metropolitan Redwood Lumber Company, employer, and the Ætna Life Insurance Company, insurer. Award for applicant, and employer and insurer petition for a writ of review. Award annulled.

*Decision rendered, May 9, 1919. 182 Pac. Rep. 315.

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Redman & Alexander, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

RICHARDS, J. The following are the undisputed facts in the case. The petitioner, Metropolitan Redwood Lumber Company, maintained a store at a small town named Metropolitan in Humboldt county. Henri Gireaux, the applicant for compensation before the Industrial Accident Commission, was an employee of said petitioner in the capacity of storekeeper having in charge its stock of merchandise in its said store. One J. T. Cleary was also employed by the said petitioner as its bookkeeper in said store. The post office of the town was at the store, and the said J. T. Cleary was the postmaster, receiving in addition to his salary as one of said petitioner's employees a salary of $10 per month from the United States government for acting as such postmaster. The post office seems to have been an adjunct of the store, and the several employees of the petitioner carried the mail to and from the post office and the railway station. A discord had arsen between Gireaux and Cleary, the former having insisted on charging to the latter's account some small items of merchandise, such as candy, which the latter had taken without charging himself. Some trouble over making change between the two intensified this discord. Just prior to the collision causing the applicant's injuries he had carried the mail across to the train and was coming back to the store with the return bag of mail when he was met by Cleary, who was taking some mail to another train, but who, upon meeting Gireaux, without further or other provocation, dropped his mail and made a personal attack upon Gireaux, striking him violently and causing the injuries for which he sought compensation. So far as the petitioner herein, their employer, was concerned, the two men were of equal rank as its employees, neither being the superior of the other in his employment.

The Industrial Accident Commission by a divided vote made the award assailed in this proceeding. The only question presented for our consideration is as to whether the said applicant was entitled to such award as for an injury arising out of his employment.

While the authorities cited by the respective parties hereto from other jurisdictions are in conflict as to the right of employees to compensation of this class of cases, we are unable to distinguish in principle between this case and the cases of Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212 L. R. A. 1916F, 1164, and Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215. It is true that in each of these cases, as in this case, the applicant at the time of his injuries was in the course of his employment; in each of those cases the act of the fellow employee which was the immediate cause of the injuries was a playful or, at least, not a willfully intentional act arising out of ill will on the part of the person causing said injuries; but the reasoning of the Supreme Court in each of the above-cited cases, as well as the authorities given in support thereof, apply equally to a case where the injury was intentionally inflicted. In the case of Coronado Beach Co. v. Pillsbury, supra, the learned justice writing the opinion, in his very full resume of the authorities touching this question, calls attention to an exception to the general rule on nonliability of the employer for injuries resulting from either the playful acts or intended assault of fellow employees, which exists where the fellow employee committing the injury did so while in an intoxicated state of frenzy and passion, which was his habitude, and which rendered it unsafe for him to be permitted to work with his fellow employees, and which condition was known to his employer, who would thus be negligent in subjecting his peaceable servants to such known risk. A second exception is also noted in the cases cited which arises in cases where the injured employee was the superior in rank to the one causing his injuries, the assault arising out of an attempted exercise of discipline on the

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part of the superior employee. Neither of these exceptions can be given application to the case at bar.

The following authorities fully sustain our view that ordinarily and outside of the exceptions above noted mjuries suffered by employees due to quarrels between themselves may not be made the basis of compensation under the Workmen's Compensation Acts: Jacquemin v. Turner, etc., Co, 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496; Stillwagon v. Callan Bros., 183 App. Div. 141, 170 N. Y. Supp. 677; Union S. M. Co. v. Davis (Ind. App.) 115 N. E. 676; Mountain Ice Co. v. McNeil, 91 N. J. Law, 528, 103 Atl. 184, L. R. A. 1918E, 494; De Fillippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761; Tarpper v. Weston, etc., Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507.

The recent case of Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312, to which our attention has been directed, arose out of quite a different state of facts; and, if there is anything contained in the opinion therein touching this case, it must be taken as supporting rather than opposing the views above advanced.

It follows that the award of the commission must be held to have been in excess of its jurisdiction, and must therefore be annulled. It is so ordered.

We concur: Waste, P. J.; Kerrigan, J.

SUPREME COURT OF ILLINOIS.

SPIEGEL'S HOUSE FURNISHING CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12503.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—REVIEW.

Under Workmen's Compensation Act, the circuit court and the Supreme Court can only pass on questions of law, and cannot reverse an award of the Industrial Commission for insufficiency of evidence, unless there was no competent evidence in the record tending to support the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Claim by Katherine Jarrett Cloyes, administratrix of the estate of Harry J. Cloyes, against the Spiegel's House Furnishing Company, employer, for compensation under the Workmen's Compensation Act for the death of her intestate. An award of the Industrial Commission was affirmed by the circuit court, and the employer brings error. Reversed and remanded.

Frank M. Cox and Albert N. Powell, both of Chicago, for plaintiff in error.

Norman G. Collins, of Chicago, for defendants in error.

*Decision rendered, June 18, 1919. 123 N. E. Rep. 606.

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DUNCAN, J. The circuit court of Cook county confirmed an award by the Industrial Commission under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152h), on the application of Katherine Jarrett Cloyes, administratrix of the estate of Harry J. Cloyes, deceased, and certified that the cause, in its opinion, is one to be reviewed by this court.

The evidence produced before the Industrial Commission was in substance the following: Harry J. Cloyes was a regular employee of Spiegel's House Furnishing Company. The last day he worked for his employer was Tuesday, June 20, 1916. The next day he was not feeling well, and remained at his home and took medicine for a cold. He had fever, his temperature being about 100 degrees, and it so continued until Thursday, when a physician was called for the first time. The physician thought probably that he had "grippe," but called again on Friday, when Cloyes showed him an abrasion on his arm, over which a scab had formed about the size of a nickel, and there was a slight redness of the skin around the scab. The doctor did not that day attribute the condition of his patient to the injury on his arm. On Saturday the doctor found the skin around the scab was much redder in appearance and that it had spread in every direction. He testified that it was apparent that the injury was caused by an external blow, and that the trouble was infection from the injury on the arm, and that the arm was swollen; that on Sunday the patient's condition was worse, and continued to grow worse until Monday, when he was sent to a hospital and an operation was performed on the same day; that he died two hours after the operation, and that his death was caused by septicemia, produced by infection of the wound.

No one saw Cloyes receive the injury, and he did not tell his employer or any of his fellow employees about receiving it. The only proof that the injury arose out of and in the course of his employment was (1) the testimony of his widow and of his physician that he told them he received his injury at his employer's store, while passing through a narrow aisle, while showing customers goods in plaintiff in error's store, and by striking his arm, just above the elbow, against the sharp corner of a dresser; and (2) the coroner's verdict reciting that Cloyes came to his death June 26, 1916, from septicemia, due to an infected wound of the right arm, received at Spiegel's House Furnishing Company while in the employ of said company as a salesman, by striking his arm against a dresser. Plaintiff in error objected to the evidence of the widow and the physician and the coroner's verdict as hearsay evidence and as incompetent.

Cloyes left surviving him as dependents a minor son and his widow. He and plaintiff in error were both operating under the Compensation Act, and his widow gave plaintiff in error notice in apt time that Cloyes claimed to be injured and the time and manner that he claimed to be injured.

The plaintiff in error offered the transcript of the testimony taken before the coroner's jury for the sole purpose of showing that the verdict was based on the same hearsay evidence of the same witnesses heard before the Industrial Commission, and on no other testimony. That evidence clearly proved its contention that it was hearsay testimony, and the same, in substance, as the evidence of the widow and the physician, which was objected to as hearsay and as incompetent.

[1] The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and

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what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured, to his attending physician, are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. Chicago & Alton Railroad Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629.

[2-5] If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this court, under our Compensation Act, can only pass upon questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it, which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing and to violate the most elementary and sacred rules for the administration of justice between private individuals guaranteed by our laws and our Constitutions, both state and national.

The injustice and the out-and-out viciousness of such a holding will more strikingly appear to all minds, if we but consider that we may at any time have another state of facts in a case that would defeat the rights of the widow and children of the deceased injured employee by a similar holding. Let us suppose that the deceased party was killed outright by revolving machinery while at work at his employment, and was never able to state how the injury occurred; that the superintendent of the employer and one other fellow employee were the only eyewitnesses to the injury; that the superintendent made declarations of the facts that showed deceased was not injured while working at his employment, or by reason of such employment, and died before he could testify; that a coroner's jury was impaneled, and the declarations of the deceased superintendent were put in evidence before the jury by some attorney representing the employer, and that the widow and children's interests were not there represented, and that the fellow employee did not testify before the coroner's jury, and that the coroner's jury returned a verdict that deceased was killed by some other agency not connected with his employment, and completely exempted the employer from all blame or connection with the death of the employee. We can readily understand that, if the verdict of the coroner's jury furnishes such convincing proof of the facts therein found as is evinced by this record, the widow and children in the case just supposed might be defeated in the contest before the Industrial Commission by the introduction of the coroner's verdict, although the fellow

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employee might appear and testify, and particularly if the employer was able to offer the testimony of several witnesses whose testimony tended strongly to impeach his evidence. On a review of such a case, this court and the circuit court would be powerless, under the law, to weigh the evidence and to pass on its weight. It is apparent that the result of holding a coroner's verdict competent evidence in such a case will result in substituting coroner's verdicts and holdings that the injury to the deceased employee arose out of and in the course of his employment for those of the Industrial Commission, and in direct contravention of the very spirit and express provisions of the Workmen's Compensation Act.

The foregoing conclusions cast no reflection upon the coroner or his juries. They are not supposed to be men educated in the law. They do their duty as they understand it. The chief blame for such results cannot be placed on the Industrial Commission. Such results have been made possible by the previous holdings of this court, in many cases of various character, that the verdict of a coroner's jury is admissible in such cases between private citizens as prima facie evidence to establish any fact or facts which our statute requires such juries to find when impaneled by the coroner, if such fact or facts are material in the trial of such cases. Our statute requires that every coroner, whenever and as soon as he knows or is informed that the dead body of any person is found or lying within his county, supposed to have come to his or her death by violence, casualty, or any undue means, shall repair to the place where the dead body is, take charge of the same, forthwith summon a jury, and swear them to diligently make the inquiries required by the statute and to deliver to him a true inquest thereof. The jurors are required to inquire how, in what manner, and by whom or what the said body came to its death, and of all the facts of and concerning the same, together with all material circumstances in any wise related to or connected with said death, and to make up and sign a verdict or true inquest.

For almost 30 years, as already indicated, this court has held that the verdict of the coroner's jury was admissible either for the plaintiff or the defendant in a civil suit for the purpose of showing prima facie some fact or facts found by the jury and appearing on the face of the inquest, when the proof of such fact or facts is material to some issue in the civil suit. We have held that such verdicts were competent to prove prima facie suicide of the assured in suits on insurance policies. United States Life Ins. Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; Grand Lodge, I. O. M. A. v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; Knights Templars' Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. In Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999, the case was a bill to construe a will, and on the issue of insanity of the testator the coroner's verdict that testator suicided was held admissible. The issue in a suit for damages for assault and battery was whether or not defendant was guilty of unlawful, willful, and wanton conduct, and the holding was that the verdict of the coroner's jury that the defendant fired the shot that killed the deceased, but was justified in the act, was competent on that issue. Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572. In other suits for negligently causing death it has been frequently held that the inquest of the coroner is admissible to show prima facie how and by what means the deceased came to his death, and any other matter properly before the coroner and appearing on the face of the inquest. Novitsky v. Knickerbocker Ice Co., 276 Ill. 102, 114 N. E. 545: Stollery v. Cicero Street Railway Co., 243 Ill. 290, 90 N. E. 709. It is said in the Novitsky Case that it is not within the province of the coroner's jury to fix the civil liability of any one growing out of an accident resulting in death, except in so

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far as the finding required to be made by the statute may have such effect. In Devine v. Brunswick-Balke-Collender Co., 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887, for negligently causing the death of a child in driving an auto truck, the holding is that the verdict of the coroner's jury, finding that the driver of the truck "was blameless for this unfortunate occurrence, and we therefore recommend his discharge from further custody," was admissible, because the question whether or not the driver was blameless was an essential matter before the coroner's jury for their investigation, and a proper matter to be included in their verdict.

Under the Workmen's Compensation Act, our holdings have been that the coroner's verdict at the inquest on the body of the employee is admissible in evidence in a case for compensation for death of the employee, and is prima facie evidence tending to prove the cause of death and of the facts therein recited, showing that the employee received his injury in the course of his employment. Armour & Co. v. Industrial Board, 273 Ill. 590, 113 N. E. 138; Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Morris & Co. v. Industrial Board, 284 Ill. 67, 119 N. E. 944, L R. A. 1918E, 919. In the last case cited it is held that the statute made it the duty of the coroner to hold an inquest, when informed that it was supposed the deceased had come to his death by casualty, and that casualty means chance, accident, contingency, etc. In Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834, the holding is that where the employee dies of tuberculosis of long standing, and there is no supposition that he came to his death by violence, casualty or any undue means, the coroner was not authorized to hold an inquest, and that the verdict of the coroner's jury was not admissible. In Peoria Cordage Co. v. Industrial Board, 284 Ill. 90, 119 N. E. 996, L. R. A. 1918E, 822, it was positively held that a finding by a coroner's jury that the death of an employee resulted from an injury while in the discharge of his duty as an employee of a certain employer is beyond the province of the coroner's jury. It was further held in that case that, in any case where the coroner is authorized to act, his authority is limited to an inquiry into the physical facts, and to obtaining evidence for the apprehension of any person implicated in the commission of a crime, and the verdict of his jury is not admissible to fix civil liability, "except in so far as a legitimate finding of physical facts * * * may have that effect." It is apparent that this decision is not in accord with the principles announced and with the conclusions reached in Armour & Co. v. Industrial Board, supra, and Morris & Co. v. Industrial Board, supra; but we think that the above holdings in that case state the law as it should be, except so far as it is qualified by the above clause in quotation marks.

The decisions of this court prior to the Peoria Cordage Co. Case have been uniform in their holdings. The departure in that case from those holdings resulted by reason of the conclusion of this court that our former decisions were wrong in principle, although uniform and consistent with the views of the court therein announced. The court is of the opinion that it should be no longer the policy of this state and the holding of this court that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charged or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants of the nature indicated in the cases just reviewed. Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are as to such holdings expressly overruled. We are moved to do this for several reasons. A review of the above cases clearly discloses that many of the cases, if not all of them, have been largely

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controlled by the admission in evidence of the verdicts of the coroner's jury, and in many of them such verdicts have furnished the sole evidence to establish liability. As a consequence of such practice there has resulted in this state a race and scramble by litigants to secure a favorable coroner's verdict that would influence or control in case a civil suit should be brought to establish a claim by reason of death. It is not intimated here that plaintiffs prosecuting such suits have offended more in this particular practice than defendants who are sued in such suits, and it is believed that the facts would disclose that both are alike guilty. It cannot be questioned that as a result of such practice the coroner's verdict in many cases has been, and will continue to be, a mere trap, or device for the purpose of catching the unwary in such suits, and that public interests intended to be served by coroner's inquests may not be so well guarded as they otherwise would be.

The allowance of coroner's verdicts as evidence in civil suits is wrong in principle, and necessarily results in much injustice to litigants. A coroner, under our law, has no judicial power. Such power is vested by the Constitution in the courts thereby created. Peoria Cordage Co. v. Industrial Board, supra. At common law the office of coroner was judicial in its nature. But if he were a judicial officer, invested with judicial powers and duties, we are unwilling to further indorse the holding that any litigant should be bound by the verdict of a coroner's jury in whose inquest he had no right to participate and did not do so. The most solemn finding or judgment of a court is not admissible against a litigant, either as res judicata or as an estoppel by verdict, unless he was a party to that judgment. Chicago Title & Trust Co. v. Storage Co., 260 Ill. 485, 103 N. E. 227. The rule has always been recognized that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. 1 Freeman on Judgments, § 154.

It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses. The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reasons above given Pittsburgh, Cincinnati & St. Louis Railway Co. v. McGrath, 115 Ill. 172, 3 N. E. 439; Knights Templars' Indemnity Co. v. Crayton, supra. If the evidence of the witnesses before the coroner's jury is not receivable against a party in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove prima facie or otherwise, any issue in such case.

So far as we have investigated, only two other states in this country, Iowa and Mississippi, have adopted the same rule as has this court with reference to the admissibility of the inquest of the coroner's jury as evidence in such cases. Metzradt v. Modern Brotherhood, 112 Iowa, 522, 84 N. W. 498; Mittelstadt v. Modern Woodmen, 143 Iowa, 186, 121 N. W. 803, 136 Am. St. Rep. 765; Tomlinson v. Sovereign Camp, 160 Iowa, 472, 141 N. W. 950; Supreme Lodge Knights of Honor v. Fletcher, 78 Miss. 377, 28 South. 872, 29 South. 523. In the Iowa cases the admissibility of the verdict or inquest was not questioned by the parties. In the Iowa case last above cited the court indicates that it might have ruled otherwise if objections to the evidence had been raised. The decided weight of the authorities in this

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country is against the admissibility of such a verdict as evidence. Ætna Life Ins. Co. v Milward (Ky.) 68 L. R. A. 285, note 296; State v. Cecil County, 54 Md. 426; Dougherty v. Pacific Mutual Life Ins. Co., 154 Pa. 385, 25 Atl. 739; Memphis & C. Railroad Co. v. Womack, 84 Atl. 149, 4 South. 618; Krogh v. Modern Brotherhood, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404; Wasey v. Traveler's Ins. Co., 126 Mich. 119, 85 N. W. 459; Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215; Sullivan v. Seattle Electric Co., 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082; In re Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; Chambers v. Modern Woodmen, 18 S. D. 173, 99 N. W. 1107; Walden v. Bankers' Life Ass'n, 89 Neb. 546, 131 N. W. 962; Boehme v. Sovereign Camp, 98 Tex. 376, 84 S. W. 422, 4 Ann. Cas. 1019.

[6] No court, we believe, has gone farther than this court to maintain the maxim or doctrine of stare decisis, when the questions decided affect the validity and control the construction of contracts, or where the rules announced have become rules of property. Rulings on the admissibility of certain documents as evidence of the character here considered, or mere questions of procedure, ought to be followed, unless they are manifestly wrong, but may, and should, be changed when the ends of justice and the public good will be better served. Rich v. City of Chicago, 59 Ill. 286; 2 Lewis' Sutherland on Stat. Const. §§ 480-514.

It will not be necessary to further discuss the questions raised relating to the coroner's verdict in question, as the court holds, for the foregoing reason, that the verdict was not admissible in evidence for any purpose. There is no competent evidence in the record tending to prove that the injury to the deceased arose out of and in the course of his employment.

The judgment of the circuit court is reversed, and the award set aside, and the cause is remanded to that court for such further proceedings authorized by law as may be desired.

Reversed and remanded.

SUPREME COURT OF IOWA.

KRATZ

v.

HOLLAND INN ET AL. (No. 32480.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INSURER'S LIABILITY.

The obligation assumed by the insurer under Code Supp. 1913, §§ 2477m41, 2477m47, of the Workmen's Compensation Act, and under the policy issued thereon, no broader than the statute, *held* to be to indemnify the employer against the liability which the act imposes on him in favor of employees injured in his service, and nothing else.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

*Decision rendered, July 7, 1919. 173 N. W. Rep. 292.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYER'S LIABILITY TO EMPLOYEE'S ATTORNEY.

Any liability of employer to attorney of injured employee exists under the general statute as to attorney's lien, Code, § 321, limited by Code Supp. 1913, § 2477m20, which states that no claim for the services of any attorney in securing a recovery under the Workmen's Compensation Act shall be an enforceable lien thereon unless its amount be approved by a judge or by the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIEN OF EMPLOYEE'S ATTORNEY—NECESSITY OF ACTION.

Where claim of injured employee under Workmen's Compensation Act was settled without action or proceeding and the money was then paid, the employee's attorney could have no lien on the money under Code, § 321, giving attorney lien for compensation on money due his client in the hands of the adverse party, in an action or proceeding in which the attorney was employed.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIEN OF EMPLOYEE'S ATTORNEY—"NOTICE TO INSURER."

Within Code, § 321, providing that lien of attorney shall date only from giving of notice to adverse party, notice by employee's attorney to employer is not notice to insurer under Workmen's Compensation Act, provision of Code Supp, 1913, § 2477m47, that insurer is bound by knowledge and notice possessed by employer, being limited to liability established against employer in favor of employee under the Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Appeal from Superior Court of Cedar Rapids; C. B. Robbins, Judge.

Action by L. M. Kratz against the Holland Inn and Iowa Mutual Liability Company, commenced in justice court. Writ of error from the superior court to review judgment of the justice in favor of the Liability Company was denied, and plaintiff appeals. The opinion states the case. Affirmed.

L. M. Kratz, of Cedar Rapids, for appellant.
Tourtellot, Donnelly & Swab, of Cedar Rapids, for appellees.

WEAVER, J. One Owens was in the employment of the defendant, the Holland Inn, and by their consent the parties were subject to the provisions of the Workmen's Compensation Statute. Owens, it is alleged, was injured in the course of his employment, and consulted the plaintiff herein, a practicing lawyer, with respect to the recovery of compensation for his injury. Thereupon plaintiff and Owens entered into a written contract dated September 29, 1916, by which plaintiff was employed to take all necessary steps to collect claim, and, if settlement could not be obtained without suit, he was to institute proper legal proceedings therefor, and to have one-half of any and all moneys so collected as payment for his services.

On the same day this agreement was presented to the judge of the superior court of Cedar Rapids, who indorsed his approval thereon, and written notice of plaintiff's claim for a lien was by him served on the

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Holland Inn, but no notice was served on the Iowa Mutual Liability Company, which company had insured the Holland Inn against liabilty to its employees.

That portion of the policy issued by said insurer, which plaintiff deems material to his action in this case reads as follows:

"In consideration of the premium herein provided and the agreements hereinafter set forth, the Iowa Mutual Liability Insurance Company of Cedar Rapids, Iowa (called the Company), hereby insures and agrees to indemnify the assured employer described in the representations hereof.

"(A) The company hereby agrees to assume, perform and pay each and very obligation that the Iowa Workmen's Law of 1913, designated as chapter 147, Acts of the 35th General Assembly of Iowa and amendments thereto, requires the herein named assured to do and perform on account of personal injuries, including death resulting at any time therefrom, sustained while this policy is in force, by any employee or employees of the assured in the course of and arising out of his or their employment by the assured in the operation of and in connection with the business herein stated.

"(B) The Company hereby agrees to indemnify the assured against loss or expense by reason of accident resulting in bodily injury or in death of an employee, who, prior to such accident, had elected, as provided by said act, not to be subject thereto and all acts amendatory thereto, in an amount not to exceed five thousand ($5,000.00) dollars, and the necessary first aid for medical or surgical attention, and subject to the same limitation for each employee, the Company's total liability for any one accident resulting in bodily injury, or in the death of more than one such employee, is limited to ten thousand ($10,000.00) dollars, and in addition to such limitations, the Company will assume and have charge of all settlements and pay all costs and expenses in the trial and defense of legal procedings against the assured, brought by such employees, their legal representatives or assigns. * * *

"(11) An employee. or the dependents of a deceased employee, who shall be entitled under this policy to compensation under the said act, shall have a first lien upon any amount due the assured by the company under the terms of this policy, and if the assured shall become insolvent or be discharged in bankruptcy during the period that this policy is in force, or the compensation, or any part of it, owing on account of the business operations covered by this policy, is due, and unpaid, or in the event of the legal incapacity, inability or disability of the assured to receive the amount so due, and pay it over to the said employee, or his dependents, the Company will pay the same directly to said employee, his agents, or to a trustee for him or his dependents, to the extent of discharging any obligation of the assured to said employee or his dependents. As between the assured and the Company, notice to and knowledge on the part of the assured of the occurrence of an injury, or death on account of which compensation is payable under this policy, shall be deemed notice to and knowledge on the part of the Company; and the jurisdiction of the assured for the purpose of this act, shall be the jurisdiction of the Company and the Company will be bound by every agreement, adjudgment, award of judgment rendered against the assured under the provisions of said act on account of the business operations covered by this policy."

On October 11, 1916, Owens without the intervention or knowledge of the plaintiff entered into an agreement with the Liability Company for a settlement of his claim against the Holland Inn for $30, which sum was then and there paid to him. This settlement was reported to the industrial commissioner of the state, and by him approved, and the same was thereupon confirmed by a decree of the district court of Linn county.

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On the date of this settlement, neither Owens nor the plaintiff in his behalf had begun any action or proceedings of any kind for the assessment or recovery of compensation or damages on account of said injury, but after said settlement and after the approval by the commissioner of the settlement with Owens, plaintiff as attorney for Owens made application to the commissioner to reopen and review the settlement and for additional compensation, which application was overruled.

It is agreed also that plaintiff has not been paid for his services in Owen's behalf, and that such services were reasonably worth $15.

The present action was begun before a justice of the peace against the Holland Inn and its insurer. The plaintiff's petition sets out the facts hereinbefore stated, and therein asks for judgment against both defendants for $15. On the trial, the facts were stipulated by the parties substantially as we have related them, and the justice entered judgment as prayed by the plaintiff against the defendant Holland Inn, but found he was not entitled to recover from the Liability Company. To review this latter finding and the judgment relieving the insurer from liability the plaintff applied to the superior court of Cedar Rapids for a writ of error, and upon examination of the reocrd, the writ was denied and judgment entered against plaintiff for costs. From this ruling and judgment the plaintiffs appeals.

[1] This appeal, being from a ruling upon a writ of error, brings up for review no question or issue of fact. We have only to inquire whether, assuming the truth of the agreed or stipulated facts, there was material error in the ruling of the trial court that such showing is insufficinet to justify a judgment against the Liability Company in plaintiff's favor.

[2, 3] That the Holland Inn is liable has been adjudicated, but is there anything in the statute or in the contract of insurance on which to predicate liability of the insurer? The insurance which the statute requires the employer to take out is upon the liability which the latter assumes or is required to accept under the "provision of this act" (Code Supp. § 2477m41), and the "policy requirement" imposed by the same statute is that it shall "assure the payment of compensation under this act," shall provide that notice to and knowledge of the employer of the death or injury of an employee, shall be notice to and knowledge on the part of the insurer and the insurer shall be bound by every agreement, award, or judgment rendered against the insured. Code Supplement, § 2477m47.

The foregong indicates the nature and extent of the insurer's liability as fixed by the statute.

Turning next to the policy itself to see whether the contract imposes anything more or greater than the statutory requirements, we find that in clause A, which is quoted above, the company has agreed with the Holland Inn "to assume, perform and pay each and every obligation which the Iowa Workmen's Law * * * requires the assured to do and perform on account of personal injuries, including death resulting at any time therefrom,sustained while the policy is in force by an employee of the assured."

In clause B, the policy indemnifies the assured against loss or expense by reason of accident resulting in bodily injury of an employee, and provides that the company will assume and have charge of all settlements and pay all costs and expenses in the trial and defense of legal proceedings against the assured brought by such employee, their legal representatives or assigns.

The other clause of the policy quoted by the plaintiff is in effect a recognition of the insurer's liability under Code Supp. § 2477m47, already quoted.

It seems very clear that the obligation assumed by the insurer as

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provided in the statute, as well as in the policy, is to indemnify the employer against the liability which the Compensation Act imposes upon him in favor of employees injured in his service, and nothing else. Now the Compensation Act does not create or impose upon the employer any liability to the attorney of his employe. That liability exists, if at all, because of another statute. The sole reference thereto in the Compensation Act is found in Code Supp. § 2477m20, where it is said that no claim for the service of any attorney in securing a recovery under this statute shall be an enforceable lien thereon, unless the amount of the same be approved in writing by a judge of a court or by the Iowa Industrial Commission. The effect of this provision is to so limit the operation of the general statute relating to attorney's liens hereinafter quoted that they may be enforced against employers under the protection of the written approval of a judge or of the Industrial Commission. In other words, to have a valid lien in such cases, the attorney must show compliance with the general statute on the subject of attorneys' liens, plus the observance of the requirements of Code Supp. § 2477m20. The general statute to which we refer reads as follows:

"An attorney has lien for compensation upon: * * * Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the posession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what service." Code, § 321.

[4] It will be rembered that, according to the agreed statement of facts that at the date of settlement with Owens no proceeding or action had been begun by Owens, or by plaintiff in his behalf, and under the provisions of this statute, plaintiff had not then acquired any lien, and, the money having been then paid, he could not thereafter acquire one.

[5] Again it is provided that the lien shall date only from the time of giving notice thereof in writing to the adverse party, and it is conceded that no such notice was ever served on the appellee. These facts would seem to be conclusive against the assertion of a lien by the plaintiff in this case.

He argues, however, that notice to the employer is sufficient because of the provisions of Code Supp. § 2477m47, by which the insurer is bound by the knowledge and notice possessed by the employer and jurisdiction of the employer is jurisdiction of the insurer, and that insurer is bound by any award or judgment against the employer. But as we have already pointed out, this provision is clearly limited to the binding effect upon the insurer of every liability established against the employer in favor of the employee under the Compensation Act, and the judgment obtained below by the attorney against the employer for the amount of his alleged lien is neither a judgment nor award in favor of the employee, and does not relate to any liability imposed by the Compensation Act.

We find in the record no ground upon which to disturb the ruling of the trial court.

The judgment appealed from is affirmed.

Ladd, C. J., and Gaynor and Stevens, J J., concur.

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SUPREME COURT OF KANSAS.

CLOSE

v.

LUCKY O. K. MINING CO. (No. 22146.)*

1. MASTER AND SERVANT—WORKMEN,S COMPENSATION ACT—AMOUNT OF AWARD.

By virtue of the provisions of subdivision 14 of section 3 of chapter 226, Laws of 1917, an injury to a leg may in some instances justify a larger amount of compensation than loss of the leg, and it was not error in this case to follow paragraph 19 of such section, instead of the schedule set forth in paragraph 14 thereof.

(For other cases, see Master and Servant, Dec. Dig. § 385[14].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RECORD—APPEAL—CONFLICTING EVIDENCE.

The record being confessedly one to be treated as if no motion for a new trial had been filed, as neither general findings nor ascertained and agreed facts are presented, claims touching excess of judgment, failure to submit to a surgical operation, and the objective character of the injury, involving an examination of conflicting evidence, cannot be considered.

(For other cases, ee Master and Servant, Dec. Dig. § 412.)

Appeal from District Court, Cherokee County.

Action by Elmer Close against the Lucky O. K. Mining Company for compensation under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Affirmed.

C. O. Pingry, J. J. Campbell, and P. E. Nulton, all of Pittsburg, for appellant.

S. L. Walker, of Columbus, and D. G. Smith, of Girard, for appellee.

West, J. The plaintiff recovered a lump sum judgment under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942) for an injury to his knee incurred while at work in the defendant's mine. The defendant appeals and claims that the judgment is erroneous because excessive, and that the district court erred in rendering a lump sum judgment.

The trial court made one finding of fact that—

"The basis of the recovery of the amount of $4,810.74 was arrived at on the theory there was a permanent partial disability of the plaintiff, under such conditions as entitled him to compensation, and the amount was arrived at by taking the amount of his compensation proven and finding that the plaintiff had an earning capacity after the injury of $1 per day and allowing the plaintiff 60 per cent. of the difference between the amount of compensation proven and the amount of earning power after the injury."

[1, 2] It is urged that the judgment is excessive because not sustained by the evidence; because the injury is one coming under the

*Decision rendered, July 5, 1919. 182 Pac. Rep. 392. Syllabus by the Court.

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schedule paragraph 14 of section 3, c. 226, of the Laws of 1917, and not under paragraph 19 thereof; because the plaintiff's capacity to work could be fully restored by a simple surgical operation. It is conceded that these matters are presented as errors of law, and as if no motion for a new trial had been filed. This precludes an examination of the evidence to see whether or not it sustains the findings, for we are not presented with findings of fact or with ascertained and agreed facts, and hence can consider errors of law only as distinguished from what might be called trial errors. Ritchie v. K. N. & D. Ry. Co., 55 Kan. 36, 39 Pac. 718; Nichols v Trueman, 80 Kan. 89, 101 Pac. 633; Filter Co. v. Bottling Co., 89 Kan. 645, 132 Pac. 180: Perkins v. Accident Association, 96 Kan. 553, 152 Pac. 786; Tacha v. Ry. Co, 97 Kan. 571, 155 Pac. 922.

It may well be that the loss of a leg might, in some instances, work less incapacity for earning wages than an injury thereto; at any rate, the schedule of the section already referred to expressly allows, for the loss of the leg, 50 per cent. of the average weekly wages during 200 weeks, while the same section, paragraph 19, provides that—

"In case of partial disability not covered by schedule the workman shall receive during such period of partial disability not exceeding (8) eight years, 60 per cent. of the difference between the amount he was earning prior to said injury as in this act provided and the amount he is able to earn after such injury."

The tral court in following this provision committed no error, for thus the law is written.

The claim that the judgment is not sustained by the evidence is one which should have been presented by a motion for a new trial if it is meant that the judgment is in whole or in part contrary to the evidence. Civil Code, § 305, subd. 4 (Gen. St. 1915, § 7205). If it is meant merely that it is not sustained by the evidence, then to go into such claim would involve on our part an examination of the conflicting testimony for the purpose of determining whether or not the judgment is supported thereby. Such a task is within the province of the trial court, but is not one to be performed for the first time by this court on appeal.

As to the failure of the plaintiff to submit to a surgical operation, it should be observed that, while the evidence on this point seems to be all set forth in the abstract, it is not harmonious nor is its effect or meaning conceded or agreed upon; and hence we cannot go into it to determine its significance.

The same may be said respecting the contention that the injury was not ascertainable by objective examination. Counsel, as other fair-minded persons might do, disagree as to what the evidence shows in this respect, and it is not for us on appeal to settle such disagreement.

The judgment is affirmed.

All the Justices concurring.

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SUPREME COURT OF KANSAS.

WOLF

v.

CUDAHY PACKING CO. (No. 22280.)*

1. RELEASE—EVIDENCE—MISTAKE.

There was evidence that tended to show a mutual mistake of fact..

(For other cases, see Release, Dec. Dig. § 57[2].)

2. WAR—"ALIEN ENEMY"—RIGHT OF ACTION UNDER WORKMEN'S COMPENSATION ACT.

A citizen of Germany, who came to this country in 1885 and then took out his first naturalization papers, which were subsequently destroyed by fire, who, previous to and at the time of the declaration of war with Germany, was working for one of the packing house companies of Kansas City, and who immediately after that declaration was, by the federal authorities, given a permit to reside in the packing house district and to work for the packing house, is not declared to be an "alien enemy" by the act of Congress of October 6, 1917 (chapter 106, § 2, 40 Stat. 411 [U. S. Comp. St. 1918, § 3115½aa]), and is entitled to prosecute an action under the Workmen's Compensation Act of this state.

(For other case, see War, Dec. Dig. 10[2].)

(For other definitions see, Words and Phrases, Alien Enemy..

Appeal from District Court, Wyandotte County.

Action under the Workmen's Compensation Acts by William Wolf against the Cudahy Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McFadden & Claflin, of Kansas City, for appellant.

Thompson, McCanles & Gorsuch, of Kansas City, for appellee.

MARSHALL, J. The defendant appeals from a judgment against it under the Workmen's Compensation Acts of 1911 and 1913 (Laws 1911, c. 218, amended by Laws 1913, c. 216). At the time of his injury, and at the time of commencing this action, the plaintiff was a citizen of Germany, but had come to this country in 1885, and had then taken out his first naturalization papers, which were afterward lost in a fire. He had been employed by the defendant for some time previous to the declaration of war with Germany, and, immediately after that declaration, he was, by the federal authorities, given a permit to reside in the packing house district in Kansas City and work for the packing house. While employed by the defendant, the plaintiff received an accidental injury, which has resulted in his permanent disability. He was treated by the defendant's physician, with whom the plaintiff made a settlement of his claim against the defendant for $114.70, and signed a written release of all further claims against the defendant on account of the injury. The release was also signed by the physician, as a witness, and was filed in the office of the clerk of the district court of Wyandotte

*Decision rendered, July 5, 1919. 182 Pac. Rep. 395. Syllabus by the Court.

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county. To avoid the settlement and release, the plaintiff pleaded a mutual mistake of himself and of the physician.

[1] 1. The defendant contends that—

"No testimony whatever was offered as to a mutual mistake of fact existing at the time the release was signed."

The plaintiff testified, in substance, that the physician had told him to go to work, and to work his hand, and it would be all right; and that, under these circumstances, he made the settlement and signed the release. There was evidence which strongly tended to show that the physician told the plaintiff that the hand would never get well, but there was other evidence sufficient to warrant the jury in finding that the physician had told the plaintiff that the hand would get well and be as good as ever. If the physician was honest—honesty must be attributed to him—and if he made the statements testified to by the plaintiff, he must have been mistaken. If both the plaintiff and the physician were mistaken as to the extent of the plaintiff's injury, the settlement and release ought not to bind the plaintiff. Weathers v. Bridge Co., 99 Kan. 632, 162 Pac. 957; Smith v. Kansas City, 102 Kan. 518, 171 Pac. 9.

[2] 2. The defendant argues that the plaintiff cannot recover because he was an alien enemy at the time of his injury, and when this action was commenced. An examination of the alien enemy act of October 6, 1917, and of the President's proclamation thereunder, reveals that this argument is not sound. The act, cited by the defendant, so far as it is material for this discussion, reads:

" 'Enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. * * *

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.' "

Act Oct. 6, 1917, c. 106, § 2, 40 U. S. Stat. at L. R. A. 1 (U. S. Comp. St. 1918, § 3115½aa).

The plaintiff was not an "alien enemy" within the meaning of the act. He was not a resident of the territory of any nation with which the United States was at war, but was a resident of the United States. No proclamation has been cited, and the court is unable to find any, declaring that persons situated as was the plaintiff cannot sue in any of the courts of the United States.

A note on "Alien Enemies as Litigants," found in L. R. A. 1918B, 189, begins with the following language:

"While an alien enemy can neither institute an action during the continuance of the war, nor prosecute an action instituted before its commencement, such disability continues only while he is abiding in his own country; and, accordingly, does not exist where he is permitted to enter or remain in the country in which suit is brought. 'A lawful residence implies protection and a capacity to sue and be sued.' "

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The citizenship of the plaintiff does not bar his recovery, and the judgment is affirmed.

All the Justices concurring.

SUPREME COURT OF KANSAS.

JACOBS

v.

HAMILTON COAL & MERCANTILE CO. (No. 22083.)*

1. ACTION UNDER WORKMEN'S COMPENSATION ACT—CONDITIONS PRECEDENT.

Under the Workmen's Compensation Act (section 5916 of the General Statutes of 1915) proceedings against an employer to recover compensation for an injury sustained by a workman in the course of his employment cannot be maintained unless a claim for compensation has been made within three months after the accident.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF FACT—CONCLUSIVENESS.

The trial court's finding of fact, based upon sufficient, though conflicting, testimony, that a claim for compensation was not made within three months, is conclusive on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT OF RECOVERY— EVIDENCE.

Errors concerning the admission and exclusion of evidence which relate to alleged injuries for which no action can be maintained need no attention on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD.

The evidence and findings pertaining to an allowance of $114 for compensation for injuries to a workman examined, and no error discerned therein.

(For other cases see Master and Servant, Dec. Dig. § 385[8].)

Appeal from District Court, Crawford County.

Actions by Ben Jacobs against the Hamilton Coal & Mercantile Company. Judgment of nonsuit in one action and as to one of the counts in the second action, and judgment for compensation on the other count, and plaintiff appeals. Affirmed.

Thomas W. Clark, of Pittsburg, for appellant.

J. J. Campbell, P. E. Nulton, and C. O. Pingry, all of Pittsburg, for appellee.

*Decision rendered, July 5, 1919. 182 Pac. Rep. 410. Syllabus by the Court.

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DAWSON, J. The plaintiff brought two actions for compensation for injuries alleged to have been sustained in defendant's coal mine.

The first action was for an injury to plaintiff's leg alleged to have been sustained on October 11, 1916. The second action, in two counts, was for an alleged injury to his eye which occurred on June 1, 1917, and for injuries to his back and shoulder which occurred on August 17, 1917. The actions were consolidated in the district court.

A jury was waived, and the plaintiff was nonsuited on his claims for compensation for his alleged injuries of October, 1916, and June 1917, on findings of the court that plaintiff had failed in each instance for more than three months to make any demand on defendant for compensation. Plaintiff prevailed in his claim for compensation for his injuries sustained on August 17, 1917.

Dissatisfied with the findings of the court touching his failure to make timely demands for compensation for his alleged injuries of October, 1916, and, June, 1917, and because of the small amount, $114, awarded him for his injuries sustained in August, 1917, he appeals.

[1, 2] Noting plaintiff's assignment of errors in the order presented, this court can discern no way to disturb the trial court's findings that no demands were made upon defendant for compensation within three months after his alleged injuries were sustained in October, 1916, and June, 1917. Such a demand was a condition precedent to a right of action under the plain terms of the statute.

"Proceedings for the recovery of compensation under this act shall not be maintainable * * * unless a claim for compensation has been made within three months after the accident. * * *" Gen. Stat. 1915, § 5916.

See Smith v. Process Co., 100 Kan. 40, 163 Pac. 645.

Plaintiff quotes some evidence which faintly tends to show that timely demands were made for compensation. The evidence for the defendant to the contrary was positive and convincing, and it was the function of the trial court to determine the truth of these disputed facts, and its findings thereon are conclusive on appeal. Bruington v. Wagoner, 100 Kan. 439, 164 Pac. 1057; Wideman v. Faivre, 100 Kan. 102, 163 Pac. 619, Ann. Cas. 1918B, 1168. Some of the evidence quoted to prove a demand would, under our decisions, tend to prove notice of the injuries (Gen. Stat. 1915, § 5916; Ackerson v. Zinc Co., 96 Kan. 783, 153 Pac. 530; Knoll v. City of Salina, 98 Kan. 428, 157 Pac. 1167; Smith v. Process Co., 100 Kan. 40, 163 Pac. 645, L. R. A. 1916A, 244, 245), but the trial court's decision did not rest on the question of notice. Plaintiff testified to a conversation with Hamilton, the president of the defendant company, by whom he was offered $13 for injuries, which he declined to accept. This offer, he contends should be construed as a waiver of specific demand. One trouble with that contention is that Hamilton also testified as to that incident, and he said that the matter of an injury to the leg or to the eye was not involved, that he never knew of those injuries, and that this conversation related to the third injury, to plaintiff's back and shoulder, and that the offer was simply for the period which plaintiff himself estimated that his last injury would delay his return to work. Obviously the trial court accepted Hamilton's explanation of the offer as true; and consequently that incident did not answer the purpose of a demand nor serve as a waiver of demand for compensation for the earlier injuries.

[3] Some complaint is made touching the admission and exclusion of evidence, but, as these matters relate to the alleged injuries of October, 1916, and June, 1917, for which no action would lie because of failure of timely demands, these errors need no consideration.

[4] The only other error assigned which is worthy of note is plaintiff's complaint touching the paucity of the compensation allowed for his

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injuries sustained on August 17, 1917. The award or judgment was pursuant to the trial court's findings, viz.:

"Court further finds on proof offered that the plaintiff was injured in mine No. 6 of the defendant on the 17th day of August, A. D. 1917.
* * *

"Court further finds on proof offered that the plaintiff's average weekly earnings for 10 months prior to the 17th day of August, 1917, amounted to $5 per week.

"Court further finds as a result of said injury sustained by the plaintiff on August 17, 1917, plaintiff was totally disabled to do and perform manual labor for a period of 6 weeks.

"Court further finds that the plaintiff was partially disabled to do manual labor as a result of said injury for a further period of 16 weeks.

"Court further finds that the plaintiff is entitled to compensation, on account of said accidental injury for a period of 5 weeks at $6 per week and in the total sum of $30.

"Court further finds that the plaintiff is entitled to compensation on account of said accidental injury for partial disability for a period of 16 weeks in the total sum of $84." (Total $114.)

Defendant argues that compensation for total incapacity should have been awarded for 416 weeks. He does not say why. He offered no evidence to prove that his injuries to his back and shoulder were permanent, nor that they would incapacitate him from working for any considerable length of time. Indeed, most of his evidence related to his alleged injuries of October, 1916, and June, 1917; and the compensation which he did receive for his injuries of August 17, 1917, were liberal, even generous, when measured by the evidence offered in support thereof.

The judgment is affirmed.

All the Justices concurring

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

FREEMAN'S CASE.

IN RE AUTOMATIC TIME STAMP CO.

IN RE AMERICAN MUT. LIABILITY INS. CO. *

1. MASTER AND SERVANT—WORKMEN,S COMPENSATION ACT—TIME FOR DETERMINATION OF DEPENDENCY.

Under Workmen's Compensation Act, pt. 2, §§ 6, 7, and pt. 5, § 2, the question of dependency on the earnings of a deceased employee is to be determined in accordance with the fact as the fact may be at the time of injury.

(For other cases, see Master and Servant, Dec Dig. § 388.)

*Decision rendered, June 25, 1919. 123 N. E. Rep. 845.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY.

Partial dependency may be found even though the dependent might have subsisted without the aid.

(For other cases, see Master and Servant, Dec Dig. § 388.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY.

A finding of partial dependency by claimant, mother of the deceased employee, a boy of 16, cannot be pronounced erroneous in law, where the boy, after leaving home, promised to send her all his earnings except what he needed for board and clothes, and he was killed in employment before his first pay day, so that he had no opportunity to remit money.

(For other cases, see Master and Servant, Dec Dig. § 388.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

In proceedings by a mother for compensation for the death of her son, evidence respecting his intent to send her the part of his wages which remained after paying his board *held* admissible in view of the relevancy of the point on the question of dependency.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BASIS OF COMPENSATION.

The "annual earnings of the deceased at the time of his injury," specified in Workmen's Compensation Act, pt. 2, § 6, are to be ascertained by reference to the same factors as are "average weekly wages" in part 5, § 2, unless inapplicable under all the circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ASCERTAINMENT OF "ANNUAL EARNINGS."

Where a boy of 16, having a partially dependent mother, was killed during the first week of his last employment, his "annual earnings," within Workmen's Compensation Act, pt. 2, § 6, are to be ascertained by the wages received by him during the 12 calendar months immediately preceding the injury.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AMOUNT OF CONTRIBUTION TO DEPENDENT—QUESTION OF FACT.

The amount of money contributed by the deceased minor employee to his partially dependent mother during the 12 calendar months before his injury and death held a pure question of fact, on which the finding of the Industrial Accident Board is final.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE OF DEPENDENCY—EXPENSES OF PARENT.

Expenses incurred by the parent on account of the deceased minor son are pertinent in determining the fact of the parent's dependency on such son within the Workmen's Compensation Act, but irrelevant in

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ascertaining the amount of compensation to be paid after dependency has been established.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under the Workmen's Compensation Act by Gertrude Freeman for the death of Clarence E. Freeman, employee; opposed by the Automatic Time Stamp Company, employer, and the American Mutual Liability Insurance Company, insurer. Compensation was awarded by the Industrial Accident Board, the award, affirmed by the superior court, and from its decree the insurer appeals. Decree affirmed.

Sawyer, Hardy, Stone & Morrison, of Boston, (Gay Gleason, of Boston, of counsel), for appellant.

John J. Scott, of Boston, for appellee.

RUGG, C. J. The deceased employe, a boy sixteen years of age, came to Boston early in September, 1918. He began going to high school, but when he found that tuition was charged him he went to work and on the twenty-sixth of the same month received fatal injuries arising out of and in the course of his employment. This was the second day of his employment.

[1-4] 1. There was evidence sufficient to support a finding of partial dependency by his mother on the earnings of the deceased. Before coming to Boston he had lived at home and had paid to his mother his wages which were substantial in amount. His father was not in good health and testified that he was not able to support his family, consisting of his wife and five children. The mother testified that she depended upon the wages of the deceased for support; that—

"Prior to leaving home, Clarence talked with her relative to sending her money for her support He said that when he went to work he would send all his money home except his board and money for his clothes. * * * He told her he would send it for her support."

He went to Boston to go to school and to work out of school hours. The mother did not know that the deceased had begun to work until she received word of his death, and he had sent her no money since he came to Boston. The question of dependency upon the earnings of a deceased employee under the workmen's compensation act is to be "determined in accordance with the fact, as the fact may be at the time of the injury." Part 2, §§ 6 and 7; part 5, § 2; Bott's Case, 230 Mass. 152, 119 N. E. 755. The fact was that at the time of his injury the deceased was at work for wages, which it was his declared purpose as well as his filial duty to send home. The circumstance that the mother did not know that the son was working and that his intent was to send her the proceeds of that particular employment as fast as earned is not by itself decisive. A simple expression of purpose to contribute to support, unaccompanied by any actual contribution after reasonable opportunity, would not constitute dependency. The case at bar, however, in substance and effect discloses injury to the employee before his first pay day and before any opportunity had arisen to make contribution to the support of the dependent out of the wages of the particular service, and substantial contributions from the earnings of earlier work. Partial dependency may be found even though the dependent might have subsisted without the aid. McMahon's Case, 229 Mass. 48, 118 N. E. 189. The deceased was a minor; hence a duty rested upon him to turn his wages over to the parent entitled thereto, and a correlative right to receive such wages vested in the parent. Tornroos v. Autocar Co., 220 Mass. 336, 107 N. E.

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1015. The finding of partial dependency by the mother cannot be pronounced erroneous in law. Kenney's Case, 222 Mass. 401, 111 N. E. 47.

[5] 2. There was no error, under the circumstances here disclosed, in the admission of the evidence respecting the intent of the deceased to send to his mother the part of his wages which remained after paying his board. Carriere v. Merrick Lumber Co., 203 Mass. 322, 327, 89 N. E. 544; Harcy v. Shelburne Falls & Colrain St. Ry., 210 Mass. 197, 199, 96 N. E. 130.

[6, 7] 3. The "annual earnings of the deceased at the time of his injury," in part 2, § 6, are to be ascertained by reference to the same factors as are "average weekly wages" in part 5, § 2, unless inapplicable under all the circumstances. It would be a strained construction to interpret "annual earnings" with reference only to the wages earned at the moment of injury and to calculate other payments under the act upon the footing of "earnings of the injured employee during the period of twelve calendar months immediately preceding the injury." The facts at bar presented a case for the ascertainment of "annual earnings" by reference to the wages received during the twelve calendar months immediately preceding the injury. See Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371.

4. No question was saved on this record to the point whether the wages earned by the deceased in the year before his death were affected by the fact that for a part of the time he received his board as well as money compensation. Hence no decision of that matter is required.

[8] 5. The amount of money contributed by the deceased to his mother during the twelve calendar months before his injury was on this record a pure question of fact, on which the finding of the board is final. Pass' Case, 232 Mass. —, 122 N. E. 642.

[9] 6. Expenses incurred by the parent on account of the son are pertinent in determining the fact of dependency, but irrelevant in ascertaining the amount of compensation to be paid after the fact of dependency has been established. Dembrinski's Case, 231 Mass. 261, 120 N. E. 856. No error is apparent in this particular.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

WORCESTER.

SANDON

v.

KENDALL.*

5. MASTER AND SERVANT—FELLOW SERVANT—TEMPORARY SERVANT.

If decedent undertook to assist a servant in performing services which it was the servant's duty to perform under the orders of the defendant's representative, the jury could find that decedent stood in the relation of a fellow servant to the servant while engaged in such service, and that he did not become a temporary servant of defendant.

(For other cases, see Master and Servant, Dec. Dig. § 192[1])

*Decision rendered, June 25, 1919. 123 N. E. Rep. 847.

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6. MASTER AND SERVANT—FELLOW SERVANT—RENDITION OF ASSISTANCE.

The mere fact that a servant acting under the general instruction of his employer rendered assistance to the representative of defendant did not constitute him a fellow servant of the representative.

(For other cases, see Master and Servant, Dec. Dig. § 192[1].)

7. MASTER AND SERVANT—TEMPORARY SERVICE—VOLUNTEER OR LICENSEE.

In responding to the request of a servant for assistance in doing his work, decedent, not an employee of any of the contractors, was not a mere volunteer or licensee.

(For other cases see, Master and Servant, Dec. Dig. § 88[4].)

Exceptions from Superior Court, Worcester County; Jabez Fox, Judge.

Action by Sadie Bergeron Sandon, administratrix, against Minott K. Kendall. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

George R. Farnum, Edward E. Ginsburg, and John G. Walsh, all of Boston, for plaintiff.

Meehan & Donahue and William E. Waterhouse, all of Boston, for defendant.

De Courcy, J. The plaintiff seeks damages for the death of her intestate, Joseph E. Bergeron, who was struck by a falling "gin pole," receiving injuries from which he died without conscious suffering. There was evidence to warrant the finding of the following facts:

The defendant had a contract to erect poles and wires for an electric line from Uxbridge to Milford. He engaged one Newell, who was in the teaming business, to unload the poles from the cars in the railroad yard at Uxbridge, and to carry them to designated locations. A gin pole was used for lifting the poles from the car and putting them upon a wagon or "reach." This pole was like a single mast derrick without guys; it was twenty-five to twenty-eight feet in length, was set in a hole in the ground eighteen inches to two feet deep, and was fastened by chains to the railroad track and to the car. In the process of the work of unloading it became necessary to move the partially unloaded car. The defendant was not there at the time, but one Lee, his only employee on the job, gave orders to have the car moved, and told Newell's men to hitch on the horses to the front of the car. Two of Newell's men were there at the time, Paine and Gray. The chains were taken off, and the gin pole was pried away from the car about two inches, to enable them to move the car by the pole. Bergeron, who was not in the employ of either party, came along, and Gray asked him "to give us a hand." Bergeron put his shoulder to the car, and was pushing it with the other men when the pole fell and struck him, fatally injuring him.

[1-3] The questions of the intestate's due care, and his assumption of the risk plainly were for the jury, and the burden of proof was on the defendant. St. 1914, c. 553. There was evidence to warrant a finding that the accident was due to Lee's negligence. He gave the orders to move the car, without taking down the unsupported gin pole, as was customary, and without taking any precautions to prevent its fall, although it showed signs of being unsteady. The jury could find also that Lee was acting within the scope of his employmnt in giving directions to move the car. Newell, who was an independent contractor, testified "we had nothing to do with moving the cars; we simply unloaded the

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poles;" and Smith, the representative of the defendant who engaged Newell, testified that he "asked * * * where he [Newell] wanted the car left to be convenient for unloading and said he would have it placed wherever Newell wished." Lee was the only representative of the defendant on the job. The jury could infer that he had at least implied authority to attend to the moving of the car. They were not obliged to accept the testimony that his only duty was to show Newell's men where to place the poles. In fact Newell testified that Lee was "in charge of his team," that "he [Newell] told his men when they left the stable to do what the man in charge told them," and that he heard Lee give orders to these men.

[4-7] As the defendant argues, the case did not go to the jury on the theory of the Workmen's Compensation Act (Laws 1911, c. 751, amended by laws 1912, c. 571) with the defences removed; and if Bergeron became in fact that fellow servant of Lee the defendant would not be liable, under the present declaration; as the negligence relied on would be that of a fellow servant In this connection the judge gave the defendant's fifth request, and called to the jury's attention the theory on which the plaintiff was proceeding in the case, "that it was not Lee who called for Bergeron but that it was Gray, one of Newell's employees, who called him for help, and that then Bergeron, having been called on the job by Gray, stands in the same position with regard to the employer of Lee that Gray would himself have stood in if he had been hurt." We cannot say as matter of law that there was no evidence to warrant this contention of the plaintiff. If Bergeron undertook to assist Gray in performing service which it was Gray's duty to perform under Lee's orders, then the jury could find that he (Bergeron) stood in the relation of a fellow servant of Gray while engaged in such service, and that he did not become a temporary servant of the defendant. Barstow v. Old Colony Railroad, 143 Mass. 535, 10 N. E. 255; Flynn v. Boston & Maine Railroad, 204 Mass. 141, 144, 90 N. E. 521. See Berry v. New York Central & Hudson River Railroad, 202 Mass. 197, 202, 88 N. E. 588. The mere fact that Gray, acting under the general instruction of his employer Newell, rendered assistance to Lee, did not constitute him a fellow servant of Lee. Sprague v. General Electric Co., 213 Mass. 375, 378, 100 N. E. 628, 45 L. R. A. (N. S.) 962. And the jury could find that Gray had implied authority to procure the temporary assistance of Bergeron in the necessary act of moving the car, which the three men present were unable to move, and when no other employees of the defendant or of Newell were available. Hollidge v. Duncan, 199 Mass. 121, 123, 85 N. E. 186, 17 L. R. A. (N. S.) 982. See L. R. A. 1915F, 1125, note. In responding to the request of Gray Bergeron was not a mere volunteer or licensee.

The defendant's first, fourth, seventh, ninth, tenth and eleventh requests were denied rightly. The others, so far as applicable to the plaintiff's case as submitted to the jury, were properly covered by the charge.

Exceptions overruled.

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SUPREME COURT OF MICHIGAN.

GABRIEL

v.

A. J. SMITH CONST. CO. ET AL. (No. 90.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT BOARD AS TRIER OF FACTS.

The Industrial Accident Board is the trier of the facts, and it is not for the Supreme Court to analyze, discuss, or pass upon the arguments of counsel in support of their respective theories as to how the deceased servant was killed, if the facts, disputed or undisputed, give opportunity for the board in its discretion naturally and rationally to infer that the death resulted from an accident while engaged in the master's business in the line of duties within the scope of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NATURAL INFERENCE—EVIDENCE.

In proceedings under the Workmen's Compensation Act for death of a boy employed as water carrier on a building under construction, evidence *held* to afford a natural and rational inference for the Industrial Accident Board to draw that the boy's fall and death resulted from an accident while engaged in the master's business.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to State Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act for the death of Mike Gabriel by Rocco Gabriel against the A. J. Smith Construction Company, the employer, and the General Accident, Fire and Life Assurance Copporation, Limited, the insurer. Compensation was awarded, and the employer and insurer bring certiorari. Award affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.

Paul P. Colombo, of Detroit (John F. Kennedy, of Detroit, of counsel), for appellee.

STEERE, J. Mike Gabriel, son of plaintiff, met his death on May 23, 1917, by falling down the shaft of a temporary skeleton elevator at a high building called the Ft. Shelby Hotel, then in process of construction at the corner of First street and Lafayette boulevard in the city of Detroit. The A. J. Smith Construction Company was engaged as contractor in the erection of this building, and deceased was employed by it as a water boy. He was 16 years of age, of Italian parentage, and was paid $2 per day of 10 hours. His work consisted of obtaining and carrying drinking water to the men working upon the building wherever they might be. He had been steadily so employed for about a month before his death.

*Decision rendered, July 17, 1919. 173 N. W. Rep. 195.

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The structure of the incompleted building had been carried up eight stories at the time of the accident. A temporary elevator or material hoist stood about 4 feet from the building, the shaft being of an open, skeleton design, constructed of wooden uprights braced and strengthened by crosspieces in an "X" form, having from each floor of the building an open landing platform or passageway of boards or plank reaching across the intervening 4 feet of the shaft by which the hoisted material was taken from the elevator into the building at the several floors as required. The elevator itself was a platform and skeleton frame moved up and down the shaft by electric power, with proper mechanism in the basement operated in response to a system of bell signals, and was used for hoisting or lowering material, tools, etc., as occasion required in connection with the construction work. None of the employees was permitted to ride upon this material hoist, and temporary stairs or ladders between floors were put up in the building for their use as the erection progressed. Notice was posted at the elevator prohibiting riding upon it. So far as shown, this prohibition was not violated by any of the employees.

The drinking water was carried to the men on the job in a common water pail, with a dipper in it for their use. Deceased's duties were to supply their wants in that particular and take the water to them where they were at work on different floors. In the performance of his duties he customarily carried the filled pails of water to the elevator or hoist, and sent them up by it to the floor or floors where water was wanted and then would proceed by the ladders, or stairways, provided for the workmen to the floor where the water had been sent and carry it from the elevator to the men where they wanted it. A witness of defendant's, who testified that this was done "quite customarily," stated that he had seen the water boy get the pail off the elevator himself and, so far as witness knew, he generally did so.

Manifestly dangers and risks not even common to all the employees attended the services of this water boy in his trips serving water to the men in various parts of that tall and unfinished building, where conditions were constantly changing as the work went on. As his duties took him to all places where men were working he was not at any time long under the eye of or associated with any particular man or group of men. He fell down the shaft in the early part of the forenoon. No one noticed him go to the place from which he fell, or saw him when he started to fall, or knew what he was doing at that time. A workman on the seventh floor saw him come up the stairway that morning, and noticed him with a pail serving water on that floor about 15 minutes before hearing of the accident, but did not particularly watch him while there, or pay any attention to where he went. No witness testified to seeing him after that time until he was falling. A foreman of the construction company called by defendant testified that he remembered seeing "Mike, the water boy," that morning some time before the accident when he was one or two floors below the eighth floor, to which construction had then progressed, with no floor above it and which was being completed that morning; that later, while standing 15 feet west of the permanent elevator shaft left in the center of the building on the eighth floor for a passenger elevator when the construction was completed, he saw the boy falling down the material hoist or temporary elevator shaft. His account of the incident in reply to questions by defendants' counsel is as follows:

"Q. Where was he the day he was killed, when you saw him? A. Falling down the elevator shaft. * * * Q. What was it that directed your attention to the fact that Mike was falling? A. The man I was talking with directed my attention to it, and wheeled me around to look. Q. Who was that man? A. A man by the name of McClellan. Q. What did you see as you turned around? A. I saw the water boy falling

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through the shaft—down the shaft. Q. At that time was he on the level of the floor or above? A. Above the floor. Q. How could he have gotten above the floor? A. Well, he might have fallen off the elevator—he might have jumped off the floor. Q. How far above the level of the floor was he? A. Three feet—about 3 feet. Q. In what position was his body as you saw him falling? A. Feet first. Q. Were any of his hands— A. One hand was extended above his head. Q. Did you notice where the platform of the elevator was at that time? A. It was up to what we call the cathead, the platform was as far as it could go on the shaft. Q. Could a man of Mike's physical stature have jumped and been in the position in which he was at the time you saw him? A. No. Q. Was it any part of Mike's duties to make repairs on the elevator shaft? A. No, sir."

This witness further testified that the boy's duties were "to carry water to the men on the job." and in so doing he was permitted to go above the first floor to "where the men were working," and that at the time he fell his water pail with water in it stood in the middle of the floor in front of the permanent elevator shaft. McClellan, who he said wheeled him around to look at the time Mike fell, was not called as a witness.

The construction company engaged in erecting this building was under the Workmen's Compensation Act (Laws 1912 [Ex. Sess.] No. 10), in reporting the accident to the Industrial Accident Board adopted the theory of the "cause and manner of the accident," as "riding on elevator (contrary to orders), and jumped off platform through hoist, and fell back down shaft," and declined to recognize any liability under the law. The testimony of all witnesses working there at that time who were interrogated is positive that they never saw any employees riding upon this elevator. The foreman, Ryan, was asked, "Did any men ride on the hoist (elevator) at that time?" and answered, "No, sir." There is no proof that this boy was ever seen riding upon the elevator, was ever reprimanded for his conduct while at work upon the building; that he neglected his duties, or violated any instructions, or was careless, reckless, or negligent in the performance of his duties. Defendants' theory is based solely upon the fact that the boy fell down this elevator shaft, and what Ryan, who said deceased "might have jumped off the floor," and that he could not have jumped, testified to.

A claim for compensation under the act was filed by plaintiff, father of deceased. Upon hearing before a committee of arbitration selected under the statute an award was made of compensation of the rate of $5.77 per week for a period of 300 weeks. Upon review of this award before the full Industrial Accident Board it found that the father was a widower who had recently buried his wife and had a family of four children of whom Mike was the oldest, the three others being little girls; that Mike always turned his wages over to his father, and they were used for the support of the family, which at times had received assistance from the city, as the father was in poor health and unable to work regularly, and the earnings of both of them had proved insufficient for the family needs. Making deductions for the maintenance of deceased by his father, and going somewhat at length into the condition, needs, and income of the family, which it is unnecessary to detail, the board found the award by the committee of arbitration excessive, and reduced it to $2.66 per week.

Of the four assignments of error made by defendants in their application for certiorari only the following one is urged and argued in their brief:

"The committee erred in finding that the accident resulting in the death of Mike Gabriel arose out of and in the course of his employment with the A. J. Smith Construction Company within the meaning of the compensation law."

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It is undisputed that the ambit of this boy's employment was anywhere on the construction job, on any parts or floors where men were at work and might want water. His duties were to get pails of water from below to where men were working on the different floors in this tall building and serve them. There is no proof that he was ever instructed to carry these pails of water up the temporary ladders from story to story. It is self-evident that a force of men must have been working at the top most of the time as the building went up and stories were added. Neither is it shown nor is there any presumption that he had but one pail with which to serve all the workmen on the different floors. It was undisputed that the hoist for carrying up material was customarily used by him to send up the pails of water to the different floors during the time of his service there, that he did this regularly, openly, and presumably under instructions as to his duties, climbing up the stairs and taking them from the elevator at the different floors to which they were sent. That the use of the elevator for that purpose was proper, so recognized by defendant, and continued after the accident is shown by one of defendant's witnesses, who testified to the custom while deceased was there and added:

"After he was killed they had another boy, and they would not allow him to take the water off the elevator. I had been working right near the elevator, and he could ask me to take it off, and I give the signals for the elevator to go down. Q. Well, was it customary for the man operating the machine to send the water up to the water boy in the elevator to whichever floor he was? A. Yes; there was a man down below on the ground floor, and the water boy would generally leave the water in, and go up the ladder. Q. So that the water pail with its contents of water was generally sent up on the elevator? A. Yes."

From this it is evident that the only change in custom, or method, after Mike was killed, was to have one of the workmen on the floor to which the water was sent go over the unguarded passage to this skeleton elevator and carry the water from it to the floor, instead of the water boy, as was the former practice.

[1, 2] As has been often said, the Industrial Accident Board is trier of the facts, and it is not for the court to analyze, discuss, or pass upon the arguments of counsel in support of their respective theories as to how this boy came to fall if the facts, disputed or undisputed, give opportunity for the board in its discretion to draw a natural and rational inference that his fall and death resulted from an accident while engaged in his master's business in the line of duties falling within the scope of his employment. Without following counsel in their claimed application or nonapplication of the cases cited where the question of whether any evidence, direct or inferential, could be discovered to support the board's finding, we conclude that the evidence in this case clearly distinguishes it from Lobuzek v. American Car & Foundry Co., 194 Mich. 533, 161 N. W. 139; Moyer v. Packard Motor Car Co., 205 Mich. 503, 171 N. W. 403, and other cases cited where it affirmatively appeared undisputed that the use of a place or appliance was forbidden, or entirely out of the employee's range of work or line of duty, and fairly make applicable the rule recognized and reasons therefor discussed in Papinaw v. Railway Co., 189 Mich. 441, 155 N. W. 545; Wishcaless v. Hammond Standish & Co., 201 Mich. 193, 166 N. W. 993, and analogous cases where the undisputed facts do not preclude a rational inference that the employee met his death in the line of duty.

The award will stand affirmed.

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SUPREME COURT OF MICHIGAN.

CHAUDIER

v.

STERNS & CULVER LUMBER CO. ET AL. (No. 41.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—BURDEN OF PROOF.

In a proceeding under the Workmen's Compensation Act to obtain compensation for death, the burden of establishing a claim for compensation is on the applicant.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEATH—PRESUMPTION.

In a proceeding under the Workmen's Compensation Act to obtain compensation for death caused by ashes found in stomach of one employed in removing ashes from a pit under a large steel burner in which was consumed the refuse from a shingle mill, an award of compensation will be vacated where the inference that the ashes were taken into the system by decedent with suicidal intent is at least as reasonable as that they found entrance to the stomach accidentally.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Bird, C. J., and Kuhn and Moore, JJ., dissenting.

Certiorari to Industrial Accident Board.

Proceedings by Mary Chaudier under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) to obtain compensation for the death of her husband, opposed by the Sterns & Culver Lumber Company, the employer, and the Southern Surety Company. There was an award of compensation, and the employer and the surety bring certiorari. Award vacated.

Claimant's decedent, a man 42 years of age, was employed by respondent Sterns & Culver Lumber Company in its shingle mill, where he worked during the week. The lumber company maintained in connection with its business a large steel burner in which was consumed the refuse from the mill. This burner was about 20 feet in diameter and 60 or 70 feet high. There were grates in the burner about level with the ground, and underneath the grates an ash pit about 3 or 4 feet deep with a cement floor. It was customary to permit the fire to go out on Saturday or to put it out in order that the ashes might be removed on Saturday night or Sunday. The work of removing the ashes from the burner had been performed by claimant's decedent for many weeks prior to his death. On Saturday, June 30, 1917, he commenced the work of removing the ashes at about 6:30 P. M., and continued until about 1:30 Sunday morning. He then went home and slept until about 8 or 9 o'clock when he resumed his work at the burner. He worked until about 2 o'clock Sunday afternoon, when he returned home, had his dinner, carried some potatoes to the field for his wife, and at about 3 o'clock returned to the burner. He returned to his home some time before 6:30 Sunday evening, the exact hour being unknown, as his wife was away. When she reached home at

*Decision rendered, July 17, 1919. 173 N. W. Rep. 198.

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6:30 she testified that he was lying on the bed and felt sick, felt like vomiting; that he seemed to sleep until 10:30, when she woke him up to try and have him undress and go to bed; that he moaned, but did not seem to recognize her; that he was in a sort of stupor from then until 12 o'clock, at which time he got up and started to walk about the room, seeming to be in pain. This lasted for about an hour, during which time he fell to the floor. Claimant went for a doctor for him at 1 o'clock in the morning, but was unable to secure medical attendance at that time. She did, however, secure a doctor at about 6 o'clock in the morning. Claimant testified that when she first saw her husband at 6:30 he seemed to be in a drunken state. "I naturally thought when I came home at 6:30 that he was asleep; that during the afternoon he had met friends at the mill who had given him liquor." The doctor, upon examining him, found no temperature and concluded that he was suffering from some stomach trouble. He administered an emetic and later washed his stomach out six times with about a quart of water each time. He found the stomach full of alkali and about a teacupful of ashes. Upon further examination the doctor testified:

"Q. That would kill a man if he got it in his stomach? A. Yes, sir.

"Q. In your judgment, he died from that? A. Yes, sir.

"Q. How did he get it in his stomach? A. He might have had a pail of water and a good deal of ashes fell in, and in a thirsty condition he might have drank that water.

"Q. The stuff that you pumped out of his stomach was an alkaline poison derived from wood ashes? A. Yes.

"Q. Now, I suppose you are enough of a chemist to be able to say that the stuff that you found in using your stomach pump was a derivative of wood ashes, and in your judgment was in sufficient quantities to cause his death? A. Yes.

"Q. Now, suppose a man had a pail of water to drink from, and some of those ashes had gotten into the water and he had not noticed it, and had drank the water, would he have drank enough water to kill him? A. By drinking enough.

"Q. I take it that stuff he had in his stomach was lye. You take leached ashes would make lye. That would kill a man? A. Yes, sir.

"Q. Suppose a man was working in those ashes, Doctor, and got quite a lot of ashes in his mouth, in his nose and mouth, and he naturally would if he were working in a lot of it—suppose he drank copiously of water—don't you suppose he could drink enough water to create lye in his stomach? A. I don't think of it that way.

"Q. How do you figure it got in? A. I can't tell; it got in in some way."

And on cross-examination he testified in part:

"Q. Ordinarily a man doesn't swallow any substance unless he wills it? A. Ordinarily, no.

"Q. Then the natural impulse, if a man gets something into his mouth that doesn't have a pleasant taste, the natural impulse is to spit it out? A. Yes, sir.

"Q. To swallow something that hasn't a pleasant taste involves an effort of the will? A. Yes, sir.

"Q. Do you think, Doctor, that a man could swallow dry wood ashes alone? A. I don't know; I couldn't tell. I imagine it would require an effort—a considerable effort.

"Q. Something like swallowing flour? A. Not as hard.

"Q. The tendency to swallow dry ashes would be to choke? A. Yes, sir.

"Q. And nature would exert itself involuntarily in an effort to expel the substance from the throat? A. Yes, sir.

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"Q. Then isn't this a fair conclusion; that if a man got dry ashes into his stomach it would be through a positive effort of the will, and against the reactions of nature? A. That would be my impression.

"Q. Could only be gotten into his stomach by voluntary action on the part of the man? A. I think so.

"Q. And in spite of the efforts of nature to prevent them going down his throat? A. Yes, sir.

"Q. Do you suppose a man could swallow wood ashes at all without moistening them in some way? A. I really don't know.

"Q. I suppose by the natural moistening that they would receive from the saliva? A. I suppose so.

"Q. How large a quantity did you find in this man's stomach? A. Of course, as I told you before, I couldn't say the quantity, and I didn't make a chemical analysis.

"Q. What is your best judgment on it? A. That is very hard to tell. I washed him out six times and four times I got alkali; the first stronger than the second; the second stronger than the third; and the third stronger than the fourth.

"Q. But I understand that you found ashes? A. Yes; I suppose as much as an ordinary teacup.

"Q. Were there enough ashes to produce alkali? A. It seems strange that there was more alkali than ashes. There was some discrepancy there.

"Q. You don't know how these ashes got into his stomach? A. No, sir.

"Q. Is it your judgment that the amount of alkali that you found there must have been generated outside of his stomach? A. I don't want to form a real opinion of that.

"Q. Think you said that the amount of ashes you found in his stomach was not sufficient to form alkali? That was the condition of his throat? A. Well, his mouth and throat we didn't examine very much, for this reason, that he was unconscious, and dying, and I didn't expect him to live as long as he did, and we didn't examine.

"Q. Did you notice any indications in mouth or throat that an alkaline substance had come in contact with those tissues? A. It would take a much stronger alkali to affect those tissues than to affect the lining of the stomach.

"Q. You said something, you and Mrs. Chaudier, about him taking some poison from liquor? A. We had some talk about whisky. He had been using some whisky, and Mrs. Chaudier brought me a bottle, and I was going to examine the bottle.

"Q. What bottle? A. The whisky bottle.

"Q. He had been drinking that day? A. I think I was told so.

"Q. By Mrs. Chaudier? A. We thought so, both of us.

"Q. Was there some left in the bottle? A. About a tablespoonful.

"Q. Do you know from your examination whether he had been drinking liquor? A. No; I couldn't tell either way.

"Q. The other condition was so much more pronounced that you couldn't say? A. Yes, sir.

"Q. What did Mrs. Chaudier say? A. Well, she thought he had been drinking some that day.

"Q. And showed you the bottle? A. Yes, sir.

"Q. You said, I think, Doctor, that this man's death might possibly be accounted for by his having drank water from a pail into which ashes had been accumulating. You think that might be? A. I think so. He might have brought some water with him and set it in a corner. I can't conceive of it in any other way.

"Q. How many swallows of liquid would it require to get into

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this man's stomach the amount of alkaline substance that you found there? A. How many swallows?

"Q. Yes. A. Well, a dozen large swallows of that stuff would account for it.

"Q. One swallow wouldn't account for it? A. No.

"Q. You don't know where the drinking supply was down there? A. No, sir.

"Q. What sort of a taste would an alkaline substance such as this have? How would it taste if a man put it in his mouth? A. It would taste a little burning.

"Q. Not like ordinary water? A. No, sir.

"Q. A man taking that would know he had something other than ordinary water? A. Yes, sir; it would burn and taste nasty."

Claimant's decedent died at about 3 o'clock Monday afternoon. One William Sterk, another employee of the respondent lumber company, testified that he had cleaned the ashes out of the burner about 25 times; that he usually took a jug of water with him, from which he would frequently drink. He said that in drawing out the ashes he would get some in his nostrils and mouth, but that it did not bother him. There was a tank about 60 or 70 feet from the burner in which there was running water all the time. Sterk testified that some of the men brought water to the mill in pails and some in jugs. The record does not disclose that claimant had a pail with him containing water on the night in question. The board, on appeal from an award by the arbitration committee, after reciting much of the testimony said:

"It seems very clear that in some way the man got a lot of ashes into his stomach. Whether a lot of ashes fell into a pail of water and became dissolved and the substance was drunk by the deceased, or whether he got quantities of ashes into his mouth and nose and then drank quantities of water and washed the ashes down, does not appear, but it seems very clear that the ashes got into his stomach in one of these ways. It is, of course, possible that the man might have deliberately put ashes into water and drank the substance and thus committed suicide, but there is no proof to that effect. The presumption of the law is against suicide in this kind of a case, and in favor of the theory of accident. We are impelled to hold that this man did suffer an accidental personal injury in being accidentally poisoned by the ashes he was handling, and that said accidental personal injury arose out of and in the course of his employment with the employer, and that said accidental personal injury was the proximate cause of his death."

Counsel for respondents claim that the facts proven are not capable of supporting either of the theories advanced by the board; that there is no proof whatever tending to show that claimant's decedent came to his death through any accidental personal injury received out of and in the course of his employment; that the manner in which decedent came to his death was a matter of pure conjecture; and that the facts proven are as consistent with non-liability of respondents as with liability. It is claimed further that the only conclusion that can legitimately be drawn from the evidence is that the man committed suicide or was drunk.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

B. H. Halstead, of Petoskey, for appellants.
Doyle & Barstow, of Menominee, for appellee.

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BOOKER, J. (after stating the facts as above). The facts upon which the Industrial Accident Board based its conclusion that claimant's decedent died from the effects of an accidental personal injury arising out of and in the course of his employment are extremely meager. They may be briefly summarized as follows:

(1) During the 23 hours preceding his death decedent had been engaged at intervals in cleaning out wood ashes from the burner.

(2) At 6:30 in the evening he was found by claimant lying upon his bed fully clothed in a comatose condition, which continued until 6 o'clock the next morning, with the exception of about an hour at midnight when he walked about the room being apparently in great distress.

(3) The physician called to attend him at 6:30 in the morning with the aid of a stomach pump removed from the stomach of the decedent a large quantity of alkaline liquid and about a teacupful of wood ashes.

(4) Decedent died from alkaline poisoning attributable to the presence in the stomach of lye and ashes.

The following conclusions would seem to be warranted by the record: Plaintiff's decedent did not die as the result of an occupational disease; in other words, the lye and ashes found in his stomach did not get there through the performance of his work in the ordinary way. This fact seems to be made clear by the testimony of the witness Sterk, who himself had removed the ashes from the burner at least 25 times. It is likewise to be noted that the work was done but once each week, so that the deleterious effect of the ashes taken into the stomach in the ordinary course of the employment, if any, could scarcely be said to be cumulative from period to period.

There is no evidence tending to show that on the night in question plaintiff's decedent had with him a pail of water into which large quantities of ashes might have fallen in the course of the work. There is no evidence that decedent drank from a pail of water heavily impregnated with ashes. There is evidence of the physician to the effect that the liquid taken from the man's stomach would be "a little burning"; that "it would burn and taste nasty"; and that "To swallow something that hasn't a pleasant taste involves an effort of the will."

Counsel for claimant assert that the foregoing facts are sufficient to support the inference indulged in by the board to the effect that decedent swallowed the ashes and alkaline liquid accidentally. They point out that, it being undisputed the lye and ashes were in the stomach and caused his death, the only possible inferences are: (1) That they were taken into the stomach by the decedent accidentally; or (2) that they were so taken willfully and with suicidal intent—and they rest upon the presumption against suicide, citing Wishcaless v. Hammond, 201 Mich. 192, 166 N. W. 993. This position is met by counsel for appellant with the argument that the presumption arises only where the facts and the logical deductions therefrom point with equal cogency to suicide or accidental death, and that in the case at bar the accidental theory is negatived by the testimony of the doctor that the substance found in the stomach of the decedent could not have been taken by decedent without a conscious effort because of its unpleasant taste.

[1, 2] The rule to be adopted by the board is set out clearly in the case of Ginsburg v. Adding Machine Co., 204 Mich. 130, 170 N. W. 15, in the following language:

"It is the province of the board to draw the legitimate inferences from the established facts and to weigh the probabilities from such established facts. Wilson v. Phœnix Furniture Co., 201 Mich. 531, 167 N. W. 839. But the inferences drawn must be from established facts; inference may not be built upon inference, possibilities upon possibilities, or, inferences drawn contrary to the established facts,

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contrary to the undisputed evidence. If an inference favorable to the appellant can only be arrived at by conjecture or speculation, the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail"—citing many cases.

Applying that rule to the facts in the case at bar, and in further consideration of the rule which places the burden of establishing the claim for compensation on those seeking the award, we are constrained to the view that the inference that the liquid and ashes found in decedent's stomach and which caused his death were taken into the system by the decedent with suicidal intent is at least as reasonable as that they found entrance to the stomach accidentally, and where two inferences equally consistent with the facts arise out of established facts, one involving liability on the part of the employer under the act, and the other relieving him from liability, the applicant must fail.

The award must be vacated.

Steere, Fellows, Ostrander, and Stone, JJ., concurred with Brooke, J.

MOORE, J. (dissenting). I do not agree with the conclusion reached by Justice Brooke. In Wishcaless v. Hammond, etc., Co., 201 Mich. 199, 166 N. W. 993, there is a collation of authorities to the effect that the presumption is against suicide. We have often held that, if there is competent testimony upon which to base the award, we would not disturb it. Section 5465, C. L. 1915; Vogeley v. Lumber Co., 196 Mich. 516, 162 N. W. 975, and cases cited therein.

When we consider the circumstances under which Mr. Chandler did his work, his conduct at his home, and the condition found by the doctor in connection with the presumption against suicide, we think there is testimony to justify the award, and that it should be affirmed, with costs to claimant.

Bird, C. J., and Kuhn, J., concurred with Moore, J.

SUPREME COURT OF MINNESOTA.

CARLSON

v.

MINNEAPOLIS ST. RY. CO. (No. 21273.)*

1. MASTER AND SERVANT—WORKMEN,S COMPENSATION ACT—EMPLOYER'S RECOVERY AGAINST THIRD PARTY—GROUNDS.

Under the Workmen's Compensation Act, the employer's right to recover the amount which he was compelled to pay to his employee's dependents from a third party, whose act was the cause of the accident, depends upon whether the negligence of such third party was the proximate cause of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

*Decision rendered, June 20, 1919. 173 N. W. Rep. 405. Syllabus by the Court.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACTION AGAINST EMPLOYER—LIABILITY OF THIRD PARTY—ELECTION—SUBROGATION.

Under the Workmen's Compensation Act, where an employee is injured in the course of his employment by the actionable negligence of a third party, a statutory remedy accrues to him or his dependents for compensation against his employer, and a common-law remedy against such third party, though he cannot proceed against both. If he elects to pursue the former remedy, he waives the latter, and his employer is subrogated to the right.

(For other cases, see Master and Servant, Dec. Dig. §§ 354,389.)

Appeal from District Court, Hennepin County; Daniel Fish, Judge.

Action by Gustaf A. Carlson against the Minneapolis Street Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Olof L. Bruce, John Lind, and A. T. Larson, all of Minneapolis, for appellant.

Ralph T. Boardman, of Minneapolis, for respondent.

QUINN, J. Plaintiff was engaged in the scavenger business in the city of Minneapolis. Charles J. Rapley was employed as one of his teamsters, and during the early morning of June 30, 1915, while in the performance of his duties, he dumped a load of waste into the river below the Washington avenue bridge and then started on his way home. He drove up the incline from the river and along Twenty-First avenue South to its intersection with Washington avenue. As he turned to the east to cross the bridge, one of defendant's street cars approached and struck the left wheel of the wagon, throwing Rapley from his seat on the wagon to the pavement, thereby injuring him, so that he died within a short time At the time of the accident, deceased, the appellant and respondent were all subject to the provisions of Laws 1913, c. 467 (G. S. 1913, §§ 8195-8230), the Workmen's Compensation Act. Rapley left, surviving him, Dorothy, his wife, and several minor children, as dependents. Mrs. Rapley proceeded against the appellant under the Compensation Act. She recovered at the rate of $10.80 per week for the period of 300 weeks, beginning July 14, 1915, and in addition thereto the sum of $100 funeral expenses. The proceedings were reviewed by this court, the judgment affirmed, and appellant paid the sum of $3,340 thereon.

The plaintiff seeks to recover from the defendant in the present action, under the Compensation Act, the amount which he was so compelled to pay the judgment referred to, with costs and expenses. At the trial the court submitted to the jury, whether negligence on the part of the defendant or its employees, caused the collision which resulted in the injury and death of Rapley. The jury found that there was no neglect on the part of the defendant or its employees. Plaintiff moved for a new trial on the ground that the verdict was not justified by the evidence and was contrary to law. The motion was denied. Plaintiff then moved the court proceed with the trial, and for judgment in his favor. This motion was denied, judgment entered in favor of the defendant, and the plaintiff appealed.

[1, 2] It is alleged in the complaint that, while in the course of his employment as plaintiff's teamster, Charles J. Rapley was driving across the defendants track at the intersection of Twenty-First avenue and Washington avenue South in the city of Minneapolis, the defendant company so carelessly and negligently ran and operated one of its street cars that it struck the wagon belonging to plaintiff, in which Rapley was then rid-

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ing, with such force that the driver was thrown therefrom to the pavement and so injured that he died shortly after.

Section 8229, G. S. 1913, reads as follows:

"That where an injury or death for which compensation is payable under part 2 of this act is caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, such party also being subject to the provisions of part 2 of this act, the employee in case of injury or his dependents in case of his death, may, at his or their option, proceed either at law against such party to recover damages, or against the employer for compensation under part 2 of this act, but not against both.

"If the employee in case of injury, or his dependents in case of death, shall bring an action for the recovery of damages against such party other than the employer, the amount thereof, manner in which and the persons to whom the same are payable, shall be as provided for in part 2 of this act and not otherwise: Provided that in no case shall such party be liable to any person other than the employee or his dependents for any damages growing out of or resulting from such injury or death.

"If the employee or his dependents shall elect to receive compensation from the employer, then the latter shall be subrogated to the right of the employee or his dependents to recover against such other party, and may bring legal proceedings against such party and recover the aggregate amount of compensation payable by him to such employee, or his dependents hereunder, together with the costs and disbursements of such action and reasonable attorney's fees expended by him therein."

It is contended on behalf of the plaintiff that he is entitled to recover from the defendant company, under the act, the amount which he was required to pay to decedent's dependents, regardless of whether it was guilty of negligence contributing to the accident. The statute provides that, where an injury or death is caused for which compensation is payable, under such circumstances as to create a liability for damages on the part of any party other than the employer, who is also subject to the provisions of part 2 of the act, the employee or his dependents, as the case may be, may proceed, either at law against such other party than the employer to recover damages, or against the employer for compensation, but not against both, clearly distinguishing between the meaning of the terms "compensation" and "damages." It is also provided that, if the employee or his dependents bring an action for the recovery of damages against such other party, the amount thereof and manner in which and the persons to whom paid shall be as provided in part 2 of the act, and that in no case shall such third party be liable to any party other than the employee or his dependnts for any such damages. The act provides that, if the employee or his dependents elect to receive compensation from the employer, then the latter shall be subrogated to the rights of the employee or his dependents to recover against such other party, and bring legal proceedings to recover the aggregate amount of such compensation.

The language is susceptible of but one meaning. It speaks for itself. The phrase "legal liability for damages," we think, has reference to common-law liability. The act does not take from the employee or his dependents the common-law right of recovery against the defendant company, if it was negligent. The case McGarvey v. Independent Oil & Grease Co., 156 Wis. 580, 146 N. W. 895, is in point. In that case the Supreme Court of Wisconsin, in speaking of this very subject, says:

"It is conceded, as the fact is, that in case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation, against

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his employer, and a common-law remedy against such third person, though he cannot have but one satisfaction."

The jury found that there was no negligence on the part of the defendant. There being no negligence, there was no common-law right of action. The verdict is supported by the evidence.

Affirmed.

SUPREME COURT OF MINNESOTA.

SODERSTROM

v.

CURRY & WHYTE, INC. (No 21235)*

1. ADMIRALTY—WORKMEN'S COMPENSATION LAW—INJURY IN MARITIME TORTS.

One employed by a shipper of pulpwood to load it on a vessel while moored on navigable waters at a dock in a port in this state, to be transported to a port in another state, is engaged in work of a maritime nature, and, if injured while so employed, does not come within the scope of the Workmen's Compensation Law of this state (Gen. St. 1913, §§ 8195-8230).

For other cases, see Admiralty, Dec. Dig. § 20.)

2. ADMIRALTY—INJURY TO LABORERS LOADING A VESSEL —RECOVERY AT COMMON LAW.

One thus employed, if injured by reason of the actionable negligence of his employer, is not limited to the relief to which seamen are entitled under the rules of admiralty, but may recover the full damages to which he would be entitled at common-law.

(For other cases, see Admiralty, Dec. Dig. § 2.)

3. ADMIRALTY—WORKMEN'S COMPENSATION LAW—EXTENSION TO MARITIME WORK—RETROACTIVE EFFECT.

The amendment to the federal Judicial Code (Act March 3, 1911, c. 231, §§ 24, cl. 3, 256, cl. 3, 36 Stat. 1091, 1161) of October 6, 1917 (Act Oct. 6, 1917, c. 97, 40 Stat. 395 [U. S. Comp. St. §§ 991(3), 1233]), which extends the rights and remedies afforded by the Workmen's Compensation Laws of the several states to persons injured while employed in work of a maritime nature, will not be given a retroactive effect.

(For other cases, see Admiralty, Dec Dig. 20.)

Appeal from District Court, St. Louis County; Wm. A. Cant, Judge.

Action by Victor Soderstrom against Curry & Whyte, Incorporated. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for appellant.

Andrew Nelson and John G. Cedergren, both of Duluth, for respondent.

*Decision rendered, June 27, 1919. 173 N. W. Rep. 649. Syllabus by the Court.

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LEES, C. Appeal from an order overruling a demurrer to the complaint. The demurrer was based on two grounds; the first, that the court had no jurisdiction of the subject of the action, and the second, that the complaint failed to state a cause of action. The court certified that the questions presented were important and doubtful. A condensed statement of the facts alleged follows:

Defendant is a Minnesota corporation dealing in and shipping pulpwood. It owns a dock at Two Harbors, in this state, on the navigable waters of that port, from which pulpwood is loaded into the holds of vessels plying on the Great Lakes. On July 2, 1917, plaintiff was a common laborer employed by defendant to convey pulpwood from the dock and tow it in the hold of the steamer Orien, to be transported to another state. Fourteen men were engaged in this work, plaintiffs station being in the old steamer. The pulpwood was carried in dump cars to spouts extended from the dock to hatches in the deck of the steamer and was dumped from the cars through the spouts into the hold. The men in the hold could not see the cars dumped, nor could the men dumping them see those working below, and there were no means of communication between them. It was the custom to dump the cars in regular order, beginning with the hatch nearest the bow and running back to the stern. The work was in charge of a foreman stationed on the deck. While plaintiff was working under one of the hatches, the contents of a car were dumped out of the customary order and he was caught under the pulpwood and seriously injured. In support of the demurrer, defendant contends: (1) That plaintiff's sole remedy is under the Minnesota Workmen's Compensation Act. (2) That, even though it should be held that he was employed under a maritime contract, the complaint fails to state a cause of action based on a maritime right. (3) That the amendment to the federal Judicial Code (Act March 3, 1911, c. 231, §§ 24, cl. 3, 256, cl. 3, 36 Stat. 1091, 1161) of October 6, 1917 (Act Oct. 6, 1917, c. 97, 40 Stat. 395[U. S. Comp. St. §§ 991 (3), 1233]), definitely relegates him to relief under the Compensation Act.

Consideration of the arguments upon which the case was submitted and examination of the authorities cited in the memorandum, which the learned trial court made part of the order overruling the demurrer, together with those cited in the briefs, have led us to the conclusion that the questions were correctly decided in the court below. We will briefly indicate our views upon them.

[1] 1. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669, L. R. A 1916D, 935, would be conclusive authority for defendant, but for the fact that a year after that case was decided the Supreme Court of the United States, in So. Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, held that a state's Workmen's Compensation Law cannot be extended to work of a maritime nature, because Congress has paramount power to fix and determine the maritime law of the land, and injuries sustained by one engaged in maritime work are within the admiralty jurisdiction. Since then the states have uniformly held, so far as we are aware, that the compensation laws do not apply to workmen injured while engaged in maritime work. Doey v. Howland, 224 N. Y. 30, 120 N. E. 53; Duart v. Simmons, 231 Mass. 313, 121 N. E. 10; Georgia Casualty Co. v. Am. Milling Co. (Wis.) 172 N. W. 148; Veasey v. Peters, 142 La. 1012, 77 South, 948.

[2] 2. In The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, rules were formulated applicable to all maritime contracts of employment. One of them was thus stated:

"That the seaman is not allowed to recover an idemnity for the negligence of the master, or any membr of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

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Counsel have referred to this as the "limited liability" rule and it is earnestly contended that this case falls within its scope, and that plaintiff was limited in admiralty to a claim for maintenance and cure. If this is true, the complaint states no cause of action, because it is framed on an entirely different theory of legal liability. We are of the opinion that the contention cannot be sustained Plaintiff was not a seaman and was not in the service of a ship. Read v. Canfield, 1 Sumn. 195, 11 Fed. Cas. No. 11,641; The John B. Lyon (D. C.) 33 Fed. 184; The J. P. Schuh (D. C.) 223 Fed. 455; The Chicago (D. C.)235 Fed. 538; The Buena Ventura (D. C.) 243 Fed. 797. We are unable to see why the question is not disposed of contrary to the defendant's contention in Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A (N. S.) 1157. In that case the man injured was a stevedore engaged in loading a ship and sought to recover from the owner of the ship and stevedore company by whom he was employed. The libel was dismissed as to the shipowner and a recovery of general damages allowed against the employer. The right to such recovery was affirmed on appeal. If Imbrovek had been a seaman, or in the service of a ship, he could not have recovered only under the limited liability rule stated in the Osceola Case.

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L Ed. 1171, does not change the effect of the decision in the Imbrovek Case, for the reason that the injury involved was sustained by a fireman on board a ship while at sea, and obviously the rule stated in the Osceola Case was applicable.

The reasons for the limited liability rule are clearly set forth in the noted opinion of Judge Story in Harden v. Gordon, 2 Mason, 541, Fed. Cas. No. 6,047. Men employed on shipboard are peculiarly liable to sickness and accidents from exhausting labor, change of climate, and exposure to perils. Public policy requires their preservation for the commercial service and maritime defense of the nation, and so the master of the ship must care for them while disabled through sickness or accident, and the costs thereof must be borne by the ship. None of these reasons apply to men living on shore and employed at ports where ships receive and discharge their cargoes or undergo repairs. Plaintiff was not in the service of the ship when injured, was not exposed to any of the hazards referred to by Judge Story, and should not be held to come within the special rule applicable to seamen. At first blush it seems far-fetched to hold that plaintiff was working under a maritime contract of employment; but such is the clear result of the decisions in the Imbrovek and Jensen Cases, for there, as here, the men injured were laborers employed solely to assist in loading or unloading a ship.

The further point is made that in admiralty full compensation for injuries caused by a failure to provide a workman on board ship with a safe place in which to work is never given unless the ship was unseaworthy or there was a failure to supply and keep in order the appliances appurtenant to it. We think this point is ruled against defendant by Atlantic Trans. Co. v. Imbrovek, supra, where, in affirming the decision of the lower court, it was said:

"The remaining question relates to the finding of negligence. * * * Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place of work.

* * * It is sufficient to say that we are satisfied from an examination of the record that the ruling was justified."

To the same effect are Siebert v. Patapsco Co. (D. C.) 253 Fed. 685; The Satilla, 235 Fed. 58, 148 C. C. A. 552; The Themistocles, 235 Fed. 81, 148 C. C. A. 575.

[3] 3. Congress appears to have been dissatisfied with the effect of the decision in the Jensen Case, for a few months after it was de-

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cided, it amended the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), which theretofore saved to suitors only the common-law remedies which the common law is competent to give, by expressly providing that claimants should also have the rights and remedies which the Workmen's Compensation Laws of any state afford. This amendment furnishes the basis of defendant's third contention. The Jensen Case was decided May 21, 1917. Plaintiff was injured July 2, 1917, and the amendment was passed October 6, 1917. It is contended that the amendment should be given a retroactive effect and that plaintiff is therefore limited to recourse to the compensation law of this state. Veasey v. Peters, supra, sustains the contention. Apparently that case was decided on the theory that the amendment affected only the remedies which were available to plaintiff, who was injured prior to its passage. The holding could not be justified on any other ground. Either this view of the effect of the amendment was not presented for consideration in the cases decided by the courts of last resort of other states, or, if presented, it has not met with favor, for in none of them, so far as we have discovered, has it been even mentioned. There is great difficulty in assenting to the view that only remedial rights are affected by the amendment. In our judgment it goes farther and affects the substantive rights of the parties to whom it applies. Under the law as it stood on July 2, 1917, plaintiff had a cause of action at common law upon the facts stated in its complaint. He might recover full compensation for impaired earning capacity, loss of wages, pain suffered, and the expense of medical treatment. Under the Compensation Law, his right of recovery was much more restricted. The former right of recovery could not be taken away from him by legislation enacted after he was injured. The Compensation Law is not an amendment of the common law. It established new obligations between employers and employees and went far beyond mere changes in the remedies theretofore open to workmen injured by reason of negligence for which their employers were legally liable. Duart v. Simmons, supra.

It was held by the Circuit Court of Appeals for the Ninth Circuit that the Arizona Compensation Act had no application to the case of a workman injured prior to its enactment. Arizona, etc., Ry. Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305, and the decision was affirmed in 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834, though on other grounds.

This court has held that the right to compensation is governed by the law in force at the date of the death of a workman and not by a subsequent amendment thereto. State v. District Court, 132 Minn. 249, 156 N. W. 120, and, inferentially, that substantive rights arise under the act and become fixed as of the date of the injury or death. State v. Gen. Accident, etc., Corporation, 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615.

"The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." Chelentis v. Luckenbach, supra.

The learned trial court was right in overruling the demurrer, and the order appealed from is affirmed.

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SUPREME COURT OF NEBRASKA.

GLOBE INDEMNITY CO.

v.

LARSON. (21026.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW —APPEAL—STATUTE.

On appeal by either party from an award of the compensation commissioner in a cause arising under the Employers' Liability Act, the district court of the county, where the employee could sue the employer at the time of the injury, is the proper court to which the cause should be submitted on appeal.

For other cases, see Master and Servant, Dec. Dig. § 417[1].)

Appeal from District Court, Dodge County; Button, Judge.

Action by the Globe Indemnity Company against Gust Larson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Courtright, Sidner & Lee, of Fremont, for appellant.

J. H. Barry, of Wahoo, for appellee.

CORNISH, J. When either party to an action, arising under the Employers' Liability Act (Rev. St. 1913, §§ 3642-3696), refuses to accept the award made by the compensation commissioner, to what district court may he cause the matter to be submitted so that the court may have jurisdiction to hear and determine the cause as provided by statute?

The injury for which the employee (named as defendant herein) asks compensation occurred in Saunders county, in which county the employee resided. The employer resided and had his place of business just across the line in Fremont, Dodge county. The parties not agreeing on the amount of compensation, the employee caused the matter to be submitted to the compensation commissioner, at Lincoln, who took testimony in both Saunders and Dodge counties; summons being served on the plaintiff insurance company in Dodge county. At the hearing before the commissioner, the claim of the employee was resisted by the plaintiff (appellant) in the place of the employer. The plaintiff, refusing to accpt the award, filed its petition, provided by statute, in the district court of Dodge county. A special appearance made by the defendant (appellee) was sustained, and the cause appealed to this court.

The question turns largely upon the interpretation of the language used in the Employers' Liability Act, as amended in 1917 (Laws 1917, c. 85). Section 3674 of the act, as amended, provides for service of notice of the injury by the employee upon "the employer as soon as practicable after the happening thereof." Section 3677 provides that the interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of the article. Section 3678 provides that disputed claims shall "be submitted to the compensation commissioner for an award." Then follows:

"If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the dis-

*Decision rendered, July 8, 1919. 173 N. W. Rep. 597. Syllabus by the Court

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trict court of the county which would have jurisdiction of a civil action between the parties."

Or as stated in section 3693:

"The district court which would have jurisdiction in an ordinary civil case involving a claim for the injuries or death in question."

Section 3680 provides the procedure which "either party" may take in case a dispute arises.

It seems clear that the submission of the cause to the district court provided for is in the nature of an appeal from an award. This is shown also by the language used in subdivision g, § 29, c. 85, Laws 1917, in which the proceeding is denominated an "appeal." Neither the employer nor the insurance company has a right of action against the employee.

While the language used is indefinite and unsatisfactory, we think that, as affecting the question of jurisdiction, the words "either party" (which mean one of two) refer to employer and employee, and the "district court" to whom the cause should be submitted is the one to which the employee would be compelled to resort in a suit for damages for injuries received. In other words, the legislative intent was to leave the forum for an action between the parties the same as it was before the enactment of the compensation law. This would be the county in which the employer resides or in which service could be had upon him—Dodge county. This would be the county where, in nearly all cases, both parties would reside, where the witnesses would reside and the cause be prosecuted with the least expense.

This conclusion, of course, will not permit the one appealing to select the forum. If, however, we were to hold that, where the statute uses the words "either party," the insurance company may be one of the two parties in mind (depending upon who is resisting the claim), then it might follow that the insurance company, as appellant, could have the cause submitted in any one of a large number of jurisdictions, for the reason that the insurance company might be sued by the appellee in any one of a large number of jurisdictions.

The jurisdiction should be determined as of the time the cause of action arose.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BUONFIGLIO

v.

NEUMANN & CO. (No. 37.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PRESUMPTION OF ACCEPTANCE.

Under Workmen's Compensation Act, § 8, in the absence of statement in writing or written notice that the provisions of section 2 were not intended to apply, master and servant are presumed to have ac-

*Decision rendered, June 20, 1919. 107 Atl. Rep. 285.

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cepted the provisions of section 2 and to have agreed to be bound thereby.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BINDING FORCE OF PROVISIONS—FATHER AND MINOR SON.

A father who received his minor son's wages was bound by the provision of Workmen's Compensation Act, § 2, accepted by the son and himself.

(For other cases, see Master and Servant, Dec. Dig. § 355.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXCLUSIVE CHARACTER OF REMEDY—ACCEPTANCE OF STATUTE.

Under Workmen's Compensation Act, § 8, providing the agreement shall be a surrender by the parties of their rights to any other method, form, or amount of compensation, the father of a minor son injured in his employment, having accepted the provisions of section 2 of the act, was subject to the act as prescribing the sole rule of compensation, and had no right of action at common law.

(For other cases, see Master and Servant, Dec. Dig. § 355.)

Appeal from Supreme Court.

Action by Felicee Buonfiglio against R. Neumann & Co. From judgment for plaintiff, defendant appeals. Reversed.

Isidor Kalisch, of Newark, for appellant.

Edward Stover, of Hoboken, for respondent.

SWAYZE, J. This action is brought by a father for pecuniary loss to him caused by an injury to his minor son, a lad 16 years of age. The son was in the employ of the defendant, to whose negligence the injury is attributed.

[1-3] There was no express statement in writing or written notice that the provisions of section 2 of the Workmen's Compensation Act (Act April 4, 1911 [P. L. p. 134]) were not intended to apply, and pursuant to section 8 the parties are presumed to havee accepted the provision of section 2, and to have agreed to be bound thereby. That the father was one of the parties so bound in the present case is shown by the fact that he received his son's wages. The question raised is whether the Workmen's Compensation Act furnishes the sole rule of compensation or whether the father has the same right of action he would have had at common law. The question turns on the provisions of the statute. Section 8 enacts that the "agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section 2 of this act." This express language settles the question adversely to the plaintiff. It distinguishes the case from King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170. The right of the Legislature to prescribe these implied, or, we should rather say, statutory, contracts, has been settled. American Radiator Co. v. Rogge, 86 N. J. Law, 436, 92 Atl. 85, 94 Atl. 85; affirmed 87 N. J. Law, 314, 93 Atl. 1083; Hetzel, Jr., v. Wasson Piston Ring Co., 89 N. J. Law, 201, 98 Atl. 306, L. R. A. 1917D, 75; Young v. Sterling Leather Works, 91 N. J. Law, 289, 102 Atl. 395.

When the plaintiff in the present case permitted his son to work for the defendant without giving notice which he might have given, he

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accepted the provisions of the statute, and thereby surrendered his right to any other method or form of compensation.

The judgment must be reversed to the end that there may be a venire de novo.

SUPREME COURT OF NEW JERSEY.

HERCULES POWDER CO.

v.

MORRIS COUNTY COURT OF COMMON PLEAS ET AL.*

MASTER AND SERVANT—INJURIES TO SERVANT—"PERMANENT INJURY"—"IMPAIRMENT."

Within Workmen's Compensation Act, § 11, defining a "permanent injury" as one where the usefulness of a member is permanently impaired, or where any physical function is permanently impaired, an injury to an employee which resulted in the loss of one of his testicles *held* a "permanent injury"; the criterion of disability partial in character and permanent in quality not being limited to loss of earning capacity.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

(For other definitions, see Words and Phrases, First and Second Series, Permanent Injury; Second Series, Impairment.)

Certiorari by the Hercules Powder Company to the Morris County Court of Common Pleas and others to remove an award made under the Workmen's Compensation Act in favor of an injured servant. Award affirmed.

Argued February term, 1919, before Parker and Minturn, JJ.

King & Vogt, of Morristown, for prosecutor.
Wayne Dumont, of Paterson, for defendants.

MINTURN, J. No question as to the quantum of the award is made in this case, if the fundamental inquiry be affirmatively conceded, that the nature of the loss resulted in a permanent injury within the contemplation of the statute. P. L. 1913, p. 304 (C. S. Supp. p. 1644). As the result of an explosion, while employed in the defendant's service, and arising out of his employment, the injured defendant lost one of his testicles. The inquiry presented is whether such a loss is equivalent to a permant partial impairment.

The statute, section 11, concedes the awarded compensation (1) "where the usefulness of the member is permanently impaired," and (2) "where any physical function is permanently impaired." The language of a statute designed as was this must be of necessity in many respects generic in verbiage, and in this instance while previously having specified particular incidents of disability, partial and total in character, as a basis for compensation, it provides that, "in all other cases in this

*Decision rendered, June 24, 1919. 107 Atl. Rep. 433.

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class" as above indicated, the award shall be made upon the basis of a permanent partial impairment.

It must be manifest that, whatever its character as to the individual impairment, the loss in this instance is permanent. But it is contended that, conceding the permanency of the loss, the functional impairment does not follow, and medical testimony is invoked to support the argument.

The lower court found that as a result of the injury, the defendant's morale, courage, and martial efficiency were lessened. Whatever view medical experts may entertain upon that phase of the case, the indisputable fact remains that the injured defendant has suffered the loss of a portion of his anatomy, which nature implanted in the human organism, as a dual reservoir of complete efficiency equally with eyes, ears, and limbs, and that to deprive him of one of these natural attributes is to take from him a component portion of the perfect genus homo, and to that extent at least impair the physical attributes of his manhood. This impairment may not prove to be so conspicuous in the ability to produce wages, in the industrial world, but there are other spheres for the employment of human energy, talents, and the possession of physical attributes besides the industrial world into the activity of which the defendant is entitled to bring, possess, and enjoy all the physical attributes with which nature endowed him.

In harmony with these considerations, it has been held that the sole criterion of a disability, partial in character and permanent in quality, under the statute, is not limited to the loss of earning power. De Zeng Co. v. Pressey, 86 N. J. Law, 469, 92 Atl. 278, affimed 96 Atl. 1102; Burbage v. Lee, 87 N. J. Law, 36, 93 Atl. 859.

In the recent selective draft, for military service, no little attention was paid to physical imperfections, which might be deemed to lessen human stamina and individual staying power. Nor can it be denied that in any computation or contest, based upon consideration of the physically perfect specimens of the race, the defendant would be at a disadvantage.

Certain it is that in a state of human excellence man has been, in English literature, termed "the paragon of animals," and one cannot doubt that in our social environment, permeated by the atmosphere of the classics or the renaissance, the defendant would be debarred as a figure for the discriminating chisel of a Phideas, the heroic pen of a Horace, or the exacting brush of a Michael Angelo. Tested by the definition Webster gives to the word, the defendant has suffered an impairment which is equivalent "to diminish in quality, excellence or strength." Its Latin root indicates "a making worse, a lessening," while the Italian derivation "imparare" indicates "a loss or diminution."

Whether, therefore, we consider the physical status of the injured defendant as lessened by the loss of a physical attribute, which serves to constitute the perfect genus homo, or as possessed of a dual entity which in natural and moral law he had a right to retain, as a reserve factor in the cosmic dispensation, the loss he sustained was a permanent impairment of his physical entity, under the provisions of our statute, and was properly compensated for as such by the award of the common pleas.

The award will be affirmed, with costs.

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SUPREME COURT OF NEW JERSEY.

LESKO

v.

LIONDALE BLEACH DYE & PRINT WORKS.*

1. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—MINOR EMPLOYED IN VIOLATION OF LAW.

Where a minor under 16 years of age was employed to operate a laundry machine in violation of Factory Act, § 7, as amended by P. L. 1914, p 525, § 4, the common-law liability of employer was not affected by the Workmen's Compensation Act, for that act applies only where the contract of hiring is a valid one.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

2. MASTER AND SERVANT—INJURIES TO SERVANT—ESTOPPEL OF INFANT SERVANT.

A minor by misrepresenting his age when employed to operate a laundry machine in violation of Factory Act, § 7, as amended by P. L. 1914, p. 525, § 4, forbidding employment of minors under 16 for such work, is not estopped from asserting that the employment was unlawful.

(For other cases, see Master and Servant, Dec. Dig. § 95.)

3. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—UNLAWFUL EMPLOYMENT.

As Factory Act, § 7, as amended by P. L. 1914, p. 525, § 4, forbids the employment of minors under 16 years to operate laundry machines, a minor so employed cannot be held to assume the ordinary risks of the employment, the Legislature having declared minors under 16 too young to appreciate such risks.

(For other cases, see Master and Servant, Dec. Dig. § 204[2].)

Action by Meri Lesko, guardian of Andrew Kline, against the Liondale Bleach Dye & Print Works. On defendant's rule to show cause after verdict for plaintiff. Rule discharged.

Argued November term, 1918, before Gummere, C. J., and Swayze and Trenchard, JJ.

King & Vogt, of Morristown, for the rule.
James H. Bolitho, of Rockaway, opposed.

GUMMERE, C. J. The defendant company operates a large laundering plant at Rockaway in this state. Some time in 1916, Andrew Kline, the ward of the plaintiff was employed by the company, and in June of that year was put to work upon a washing or laundering machine. His specific work was to keep the edge of the goods which were run through the machine from curling or getting folded, as it passed over the rollers. His hand apparently became entangled in the machinery, was drawn in between two of the rollers, and crushed. At the time of the accident, Kline was under 16 years of age; but this fact was not known to the de-

*Decision rendered, June 17, 1919. 107 Atl. Rep. 275.

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fendant. On the contrary, Kline himself, at the time of his employment, represented to the company's superintendent that he was then over 16 years old.

This suit is based upon the common-law liability of an employer to compensate an employee for injuries received in his employment by reason of the negligence of the master. The trial resulted in a verdict for the plaintiff.

[1] The first ground upon which we are asked to make this rule absolute is that since the enactment of chapter 95 of the Laws of 1911, commonly known as the Workmen's Compensation Act, that statute provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of, and arising out of his employment, and abrogates the common-law liability of the master for such injuries. But this statutory provision with relation to the recovery of compensation only applies where the contract of hiring is a valid one, and not where such a contract is prohibited by the statute law of the state; and this is the situation now presented. By an amendment passed in 1914 (P. L. p. 525) to the Factory Act of 1904, § 7 (P. L. p. 152), it is declared (section 4) that—

"No minor under the age of sixteen shall be employed, permitted or suffered to work at any of the following occupations or in any of the following positions: adjusting any belt to any machinery; * * * operating or assisting in operating any * * * laundering machinery," etc.

In the case of Hetzel, Jr., v. Wasson Piston Ring Co., 89 N. J. Law, p. 201, 98 Atl. 306, L R. A. 1917D, 75, it was declared by the Court of Errors and Appeals that, where an infant was put to work by his employer in direct contravention of the provisions of the Factory Act, the common-law liability of the employer to compensate his employee for injuries caused by the negligence of the former was not affected by the provisions of the Workmen's Compenation Act.

[2] But it is argued that the doctrine of the Hetzel Case has no application where the employer is induced to hire the employee by reason of a false representation made by the latter as to his age, the representation being that he is not within the age limit specified in the statute. The argument rests upon the theory that, the false representation having been the inducing cause of the employment, the infant employee is estopped from taking advantage of the statute; or, stated in another way, will not be permitted to deny the truthfulness of the statement made with relation to his age.

It is enough to say, disposing of this contention, that since the argument of this case the court of Errors and Appeals in Feir v. Weil, 106 Atl. 402, in an opinion promulgated in March of this year, expressly declared that the doctrine of estoppel in pais has no application where the employment of the infant is in violation of the provisions of the Factory Act. In that case, as in the present one, the employe falsely represented his age, and the master hired him believing the truth of the representation.

[3] Another ground upon which we are asked to set aside the present verdict is that the injury which befell the plaintiff was an ordinary risk assumed by him in the normal operation of the machine; but this contention is unsound. As was pointed out in the Hetzel Case, the primary purpose of the provision of the Factory Act, which has already been cited, is to protect all children who are too young to appreciate the dangers arising out of work in places or upon machines such as those described by the Legislature; and it cannot be said, in view of this legislative purpose, that a child who is too young to appreciate the dangers arising out of his work, and incident thereto, assumes the risk of such dangers; No risks are assumed except those which are or ought to be obvious to the party inccurring them. As was said in Lenahan v. Pitts-

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ton Coal Mining Co., 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 88, when the Legislature has distinctly established an age limit under which children, shall not be employed, it, in effect, has declared that a child under that age limit does not have the mature judgment, experience and discretion necessary to engage safely in work prohibited by the statute; and, consequently, a boy employed in violation of the legislative mandate is not chargeable with contributory negligence, or with having assumed the risks arising out of that employment.

Lastly, it is contended that the verdict is excessive. It is enough to say, in disposing of this phase of the case, that the evidence on this point does not justify us in saying that the award of damages is clearly greater than the compensation which the plaintiff is entitled to recover for the injuries received.

The rule to show cause will be discharged.

COURT OF APPEALS OF NEW YORK.

PLASS

v.

CENTRAL NEW ENGLAND RY. CO.*

On Reargument.

2. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—INTERSTATE COMMERCE—REVIEW OF FINDINGS OF FACT.

In a proceeding under the Workmen's Compensation Act for the death of a section hand from contact with poison ivy while cutting weeds on the right of way, where there is some evidence to sustain a finding of the State Industrial Commission that deceased was not engaged in interstate commerce, on the theory that the weeds could stall trains, but that the weeds were cut solely to comply with railroad-Law, § 82, it will not be disturbed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Collin, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of Jane Plass under the Workmen's Compensation Act against the Central New England Railway Company for the death of Peter Plass, an employee. An award of the State Industrial Commission was affirmed by the Appellate Division (172 N. Y. Supp. 614), and the employer appeals. Order affirmed.

An order of the Appellate Division of the Supreme Court in the Third Judicial Department (172 N. Y. Supp. 614), entered November 26, 1918, affirmed an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). Claim-

*Decision rendered, March 11, 1919. On Reargument, June 6, 1919. 123 N. E. Rep. 852.

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ant's husband was employed as a section hand on defendant's railroad. While mowing grass and weeds along the right of way he came in contact with poison ivy, resulting in blood poisoning and acute congestion of the lungs, from which he died. The only question was whether he was engaged in interstate commerce at the time of the accident. The State Industrial Commission held that he was not. It appeared that the road in question was a short line, consisting of about 23 miles of single-track road running from Rhinecliff, on the New York Central Railroad, to Silvernails, and from Silvernails to Boston Corners, 12 miles further, where there is a junction point on the Central New England. While some freight was shipped out of the state, the witness could not state of any train as a whole going out of the state during the six months prior to the accident. See, also, 172 App. Div. 916, 156 N. Y. Supp. 1141.

Edward R. Brumley and John M. Gibbons, both of New Yorb City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with cost.

Hiscock, C. J., and Chase, Collin, Cuddeback, Hogan, McLaughlin, and Crane, JJ., concur.

PER CURIAM. Motion for reargument granted. See 226 N. Y.—, 123 N. E. 852.

On Reargument.

CRANE, J. When this case was here before, we sent it back to the commission to determine whether or not Plass, the deceased, was engaged in interstate commerce. 221 N. Y. 472, 117 N. E. 952. This question of fact had not been determined. Upon a rehearing it was found by the State Industrial Commission that he was not engaged in interstate commerce at the time he received the injury resulting in his death.

The award to the widow was affirmed by the Appellate Division and by this court. A reargument has been had, upon the assertion that the decision of New York Central Railroad Co. v. Porter, 249 U. S.—, 39 Sup. Ct. 188, 63 L. Ed. — (decided March 3, 1919), requires us to reverse our former decision.

[1] The powers of this court are limited by the Constitution of the state to a review of questions of law, except where the judgment is of death. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to support a finding of fact or a verdict not directed by the court shall be reviewed by the Court of Appeals. Const. art. 6, § 9.

As the Appellate Division decision was not unanimous in affirming this award, we are permitted to review its detemination to the extent only of ascertaining whether there be any evidence or reasonable inferences deduced from the testimony upon which to base it.

[2] Plass was engaged on the 8th day of August, 1914, as a section laborer in mowing grass upon the right of way of the Central New England Railway in the town of Red Hook, Dutchess county, N. Y. He contracted ivy poisoning, resulting in his death August 29, 1914.

The road was a short line of about 35 miles of single track, running from Rhinecliff, on the New York Central, to Boston Corners, where there is a connection with Central New England Railroad. At times cars used for interstate shipment passed over this branch.

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Section 82 of the Railroad law (Consol. Laws, c. 49) reads as follows:

"Every railroad corporation doing business within this state, shall cause all Canada thistles, white and yellow daisies and other noxious weeds growing on any lands owned or occupied by it, to be cut down twice in each and every year, once between the fifteenth day of June and the twenty-fifth day of June, and once between the fifteenth day of August and the twenty-fifth day of August. If any such corporation shall neglect to cause the same to be so cut down, any person may cut the same, between the twenty-fifth day of June and the fifth day of July inclusive, and between the twenty-fifth day of August and the fifth day of September inclusive in each year, at the expense of the corporation on whose lands the same shall be so cut, at the rate of three dlolars per day for the time occupied in cutting."

In compliance with this law the railroad once a year, perhaps twice, cut the weeds upon its right of way.

It was while doing this work that Plass was poisoned. For five feet each side of the tracks the roadbed was kept clean of the weeds by shovels, so that it was between the fence alongside the right of way and this five feet that Plass was working.

Cuneen, the assistant superintendent said:

"The nature and purpose of the work is to cut the weeds and grass along the right of way in order to prevent fires to bridges and trestles and spreading to adjacent property. * * *To prevent the grass and weeds getting on the rails and stalling the trains."

There was no bridge or trestle within a mile of this place; in fact, there is no evidence to show that there is any bridge or trestle on the 35 miles of road, if so, what it is made of. Crilley, "the Rhinecliff branch" supervisor, testified that Plass "was mowing the right of way, cutting grass and bushes." It is fair to assume that the right of way referred to was the space from the rail to the fence. It is not likely he would mow between the rails.

The triers of fact were not obliged to believe that weeds growing here could or would stall trains. These witnesses for the railroad company, in view of all the circumstances, could reasonably be charged with some exaggeration. Whether or not the weeds on the right of way were cut solely to comply with the Railroad Law and prevent fire to adjoining property or to protect bridges and trains was a question of fact for the Industrial Commission, and we think there was some evidence or at least reasonable inference to be drawn from the evidence to sustain its conclusion.

If this be so, we cannot pass upon weight of evidence and say whether, in our opinion, this question of fact were rightly decided. In order to present the question we have taken the evidence most favorable to the respondent, which the commission might have believed.

The order appealed from should be affirmed, without costs.

Hiscock, C. J., and Cuddeback, Cardozo, Pound, and Andrews, J. J., concur. Collins, J., dissents on authority of N. Y. C. & H. R. R. R. Co. v. Porter, 249 U. S.—, 39 Sup. Ct. 188, 63 L. Ed.—, decided March 3, 1919.

Order affirmed, etc.

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SUPREME COURT OF NEW YORK.

SPECIAL TERM, KINGS COUNTY.

BASSO ET AL.

v.

JOHN CLARK & SON, INC.*

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—EXCLUSIVE REMEDIES—ACTIONS FOR WRONGFUL DEATH.

It was within the power of the Legislature under Const. art. 1, § 19, to provide in Workmen's Compensation Law, § 11, that liability in death cases shall be exclusive, except in certain cases.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ACTIONS FOR WRONGFUL DEATH—ELECTION OF REMEDIES.

Where defendant in an action for negligently causing death has complied with the Workmen's Compensation Law, the benefits of such law are exclusive, and an administrator may not bring an action under Code Civ. Proc. § 1902.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ACTION FOR WRONGFUL DEATH—PLEADING NEGATIVING DEFENSES.

Administrators, suing for damages for negligently causing the death of his intestate under Code Civ. Proc. § 1902, made out a prima facie case, when they stated a cause of action under such section, and were not bound to negative Workmen's Compensation Law, § 11, making remedies under such law exclusive; such section operating as a proviso

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Action by Josephine Basso and another, as administrators of the estate of Salvatore Basso, deceased, against John T. Clark & Son, Incorporated, to recover for wrongful death of intestate. On defendant's motion for judgment on the pleadings. Motion denied

Russell & McGoldrick, for plaintiffs.
Nadal, Jones & Mowton, of New York City, for defendant.

BENEDICT, J. [1, 2] Administrators sue defendant under section 1902 of the Code of Civil Procedure for damages for negligently causing the death of Salvatore Basso, their intestate. At common law an action for negligently causing death abated upon the death of the person injured. Neither the right to bring such an action as the present nor the remedy afforded by our Code provision existed at common law. The present action is purely statutory. McKay v. Ry. Co., 208 N. Y. 359, 101 N. E., 885. Statutes conferring the right to maintain actions for damages in death cases are within the legitimate scope of state legislation.

*Decision rendered, July, 1919. 177 N. Y. Supp. 484.

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Such enactments are upheld, although relating to or affecting incidentally matters which are maritime in character.

[3, 4] Legislation of this nature, essentially local and operating in personam, does not effect an unauthorizeed change or modification in the general martime law, nor does it contravene the provision of the federal Constitution (article 3, § 2) extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," nor the acts of Congress saving to suitors the right of a common-law remedy. In fact, it has been expressly held that state legislation similar to our Code provision is a "general law of personal rights, not specially directed to commerce or navigation, but applying alike on sea and shore," and such a statute does not contravene or interfere with the "proper harmony and uniformity" of the maritime law in its international or interstate relations. The question has been considered in the following cases: The City of Norwalk (D. C.) 55 Fed. 98, 106, 108; Southern Pac. v. Jensen, 244 U. S. 205, 216, 37 Sup. Ct. 524, 61 L. Ed 1086, L. R. A. 1918C, 451 Ann Cas. 1917E, 900 (citing The City of Norwalk) ; The Hamilton, 207 U. S. 398, 403, 28 Sup. Ct. 133, 52 L. Ed. 264; The Lottawanna. 21 Wall. 558, 579, 580, 22 L. Ed. 654

It seems to me, therefore, that the question of the right of a litigant to elect between the benefits of the Workmen's Compensation Law of New York (Consol. Laws, c. 67), a suit in admiralty, or an action at common-law, discussed by counsel for the defendant and in the cases cited by him, is not germane to any question presented on this motion.

The right to elect to proceed in admiralty is not involved, because the plaintiffs have not so attempted. The right to elect between the Compensation Law and an action at common-law is not presented, because the plaintiffs have neither a right nor a remedy enforceable at common-law. The action which they have attemped to bring is purely statutory, and the sole question in this respect is therefore whether they may elect between the Compensation Law and an action in the courts under the Code provisions. I think the question must be answered in the negative.

Since, as already shown, a statute authorizing an action for negligence in causing the death, even though the deceased was engaged at the time in work of maritime character, does not offend against the federal Constitution or any act of Congress, nor contravene any essential feature of the harmony and uniformity sought to be preserved in the administration of the maritime law, it follows that the action so authorized by such a statute stands in the same category and is affected by the Workmen's Compensation Law equally and in like degree as any other action authorized by local statute or sanctioned by the common-law as applied in this state.

[5, 6] The State Constitution (article 1, § 19) authorizes the Legislature to enact Workmen's Compensation Laws, and confers upon it in this respect plenary powers. The Legislature may provide that such compensation and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries," etc. Pursuant to such constitutional authorization, the legislature has provided in section 10 of the Compensation Law for liability in death cases, and in section 11 has enacted that such liability shall be exclusive, except that in case the employer fails to comply with the provision of section 50 an action may be brought in the courts at the election of the injured party. It follows that, if the defendant has complied with the provisions of the Compensation Law, the benefits of that law are exclusive, and hence that the present action may not be maintained. Shanahan v. Engineering Co., 219 N. Y. 469, 114 N. E. 795.

The question still remains whether the plaintiffs must affirmatively allege a failure by the defendant to secure the payment of compensation, as required by section 50 of the Compensation Law, and their consequent election to sue in the courts, or whether this is matter to be plead-

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ed by way of defense. The following cases seem to hold that the burden of pleading in this respect is upon the plaintiff: Nulle v. Hardman Co., 185 App. Div. 351, 173 N. Y. Supp. 236; Shinnick v. Clover Farms Co., 169 App. Div. 237, 154 N. Y. Supp. 423; Ruddy v. Morse Co.,—App. Div.—, 176 N. Y. Supp. 731.

Notwithstanding these decisions it seems to me that the question is still arguable. In the Shanahan Case, supra, the complaint set forth a cause of action under Code Civ. Proc. § 1902, but did not allege the failure of the defendant to secure compensation as required by the Compensation Law. The answer set up as a separate defense the Compensation Law; that such law provided that the employer, upon securing the payment and compensation as therein provided should be relieved from all liability, etc., that the occupation in which plaintiff's intestate was employed at the time of the injuries was within the protection of the Compensation Law; and that the defendant had secured the payment of such compensation as required by that law. The plaintiff demurred to this defense and the question certified to the Court of Appeals was: "Should the demurrer to the second defense in the answer be sustained " The qustion so certified was answered in the negative.

This seems to me to be a decision to the effect that pleading compliance by the defendant with the Compensation Law is a good defense to an action under section 1902 of the Code. Therefore how can it be said that pleading noncompliance with that law is an essential element of the cause of action? If the complaint in the Shanahan Case was defective for failure to allege noncompliance by the defendant with the Compensation Law, it seems to me that the Court of Appeals would have so indicated. It is difficult to conceive that the Court of Appeals decided, that compliance with the statute was a good defense to a complaint bad for failure to allege noncompliance with the same statute. See, also, Schittner v. American Tobacco Co., 100 Misc. Rep. 261, 165 N. Y. Supp. 479.

Besides, it has never been contended, so far as I am aware, that the Compensation Law either expressly or impliedly repeals section 1902 of the Code of Civil Procedure. That statute still remains in force and is applicable to all cases not included within the scope of the Compensation Law; and in the Shanahan Case the court states that, if the employer fails to comply with the statute, "he is subjected to such an action as the present one as a penalty"; and the court has already characterized that action as one brought under section 1902 of the Code. What relation, then, does section 11 of the Compensation Law bear to section 1902 of the Code? What effect does it have upon the Code provision?

[7] Section 11 in effect takes out of the operation of section 1902 of the Code the right to enforce liability in certain cases embraced within the terms and conditions of the Compensation Law. It ingrafts a limitation upon the liability enforceable under that section. In this respect it may be contended, I think, with some plausibility that section 11 operates as, and performs the functions of, a proviso. It is a subsequent enactment, and it curtails the rights enforceable under a prior statute If this section may be considered as a proviso, then the plaintiffs made out a prima facie case when they stated a cause of action under section 1902 of the Code. They were not bound to negative section 11 of the subsequent act. See Rowell v. Janvrin, 151 N. Y. 60, 67, 68, 45 N. E. 398.

[8] I think this motion may be entertained notwithstanding that an answer containing denials has been interposed. See the following cases: Longenecker v. Longenecker, 140 N. Y. Supp. 403; Guggenheim v. Guggenheim, 95 Misc. Rep. 332, 159 N. Y. Supp. 333; Spielberg v. Canada S. S. Lines, 98 Misc. Rep. 304, 162 N. Y. Supp. 610; Schleissper v. Goldsticker, 135 App. Div. 435, 120 N Y. Supp. 333; Olsen v.. Mfg. Co. 143 App. Div. 142, 127 N. Y. Supp. 697; O'Rourke v Patterson, 157 App. Div. 284, 142 N. Y. Supp. 195; Field v. Empire Case Goods Co., 179 App. Div. 253, 255, 166 N. Y. Supp. 509.

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It was held in Nilsen v. Am. Bridge Co., 221 N. Y. 12, 116 N. E. 383, that in a common-law action, where it does not appear from the complaint that plaintiff was engaged in an employment classed as hazardous in the Workmen's Compensation Law, the question was not presented whether the plaintiff, by reason of said law, is barred from the right to recover, and that, therefore, a demurrer to the complaint cannot be sustained upon the ground that the complaint failed to state facts constituting a cause of action, merely because the remedy provided in the Compensation Law is exclusive. By analogy this reasoning seems to be applicable to the present case.

The defendant's motion for judgment on the pleading should, I think, upon these considerations be denied. Ten dollars costs of motion.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BRYANT

v.

PULLMAN CO.*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —AMOUNT OF COMPENSATION—"WAGES"—PORTER'S TIPS.

The tips received by a Pullman car porter are understood by the porter and the company to be part of his "wages," and can be considered as such in determining the compensation to which he is entitled for injuries

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

(For other definitions, see Words and Phrases, First and Second Series, Wages.)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law for compensation for the injuries of Perry O. Bryant, employee, opposed by the Pullman Company, employer and self-insurer. From an award in favor of the claimant by the State Industrial Commission, the employer appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane., and Henry T. Kellogg, JJ.

Locke, Babcock, Spratt & Hollister, of Buffalo ,Maurice C. Spratt, of Buffalo, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

JOHN M KELLOGG, P. J. The accident to the claimant occurred March 17,1918. He was a porter on the company's sleeping car. At the time of the accident, under the act of Congress and the proclamation of

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 488.

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the president, the cars of the company were operated under federal control. The proclamation of the President provided (U. S. Comp. St. 1918, p. 275) that the Director General of railroads "may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, officers, and employees" of the companies. Act of Cong. March 21, 1918, c. 25, § 10, 40 Stat. 451 (U. S. Comp. St. 1918, § 3115¾j). contemplated a continuing liability of the companies, and actions against them are not inconsistent with the act or the proclamation of the President .The express business was carried on by the appellant for the government, under the proclamation of the President, until August 17, 1918, when, by a general order, the Director General assumed the management of the business under managers appointed by him.

[1] The appellant raised no question with the goverment as to the effect or validity of the act of Congress or the proclamation of the President, but acquiesced in them and operated its cars as contemplated by the act. If, instead of so doing, it had contested the question with the government, a different situation might have arisen. But having operated its cars under the act, it cannot now raise the question that the government could not compel it to do so. That question is in the past. It did operate its cars, and the claimant was its employee in that service. It was carrying on the express business by and under the direction of the Director General. In effect the government was the lessee of the cars, the company the lessor, and by the terms of the lease the business was carried on by it under government control. The question is not one of substance. If the lessee was carrying on its business through the lessor, and the latter is required to pay compensation under this award, it has ample recourse against the lessee, and undoubtedly any liability imposed upon it will be met in the adjustment of the rentals. We consider the question more one of technicality than of substance, and are prepared to hold that for the purposes of the protection of the claimant under the Workmen's Compensation Law (Consol. Laws, c. 67) the appellant was his employer and that the award may stand.

[2] It is urged, however, that the award rested upon a wrong basis as to tips received by the porter, which were treated as a part of his wages, and an ingenious, but unsuccessful, attempt is made to distinguish this case from Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. It is improbable that the company could employ a porter for $1 a day, if other compensation was not in contemplation. The company puts its patrons in the hands of underpaid porters, expecting that the patrons will not suffer the porter to remain underpaid, but will help the company pay for the services rendered by them. Such is the common understanding.

The award should be affirmed.

Award unanimously affirmed.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

DRUMMOND ET AL.

v.

ISBELL-PORTER CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

Persons claiming death benefits under the Workmen's Compensation Act are bound to bring themselves within the language of the act.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

In a proceeding under the Workmen's Compensation Act by parents residing in a foreign country to recover for the death of their son, evidence *held* insufficient to show that he had contributed to their support for a period of one year prior to the date of the accident.

(For other cases, see Master and Servant, Dec Dig. § 405[5].)

John M. Kellogg, P, J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim for compensation under the Workmen's Compensation Act by Charles Drummond, dependent father, and Margaret Drummond, dependent mother, of Arthur Drummond, deceased, against the Isbell-Porter Company, employer, and the Manufacturers' Liability Insurance Company, insurance carrier. From an award of the State Industrial Commission in favor of claimants, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Lee & Brewster of Syracuse (P. Sidney Hand, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Attv. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The deceased, Arthur Drummond, was a bricklayer. He came to his death while taking measurements from the top of a furnace, where it is assumed he stepped upon some recently laid bricks on the edge of the furnace wall, which, falling out of place, caused him to lose his balance and drop to the floor below, fracturing his skull and producing death.

So far as the record shows, there was, in this accident, nothing on which an action of negligence could rest under the provisions of section 1902 of the Code of Civil Procedure, and the claimants here are the father and mother of the decedent, residing in England, and there are brothers and sisters living. We call attention to these matters simply to emphasize the fact that the claimants can have no legal rights outside of those which depend upon the provisions of the Workmen's Compen-

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 525.

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ation Law (Consol. Laws, c. 67). The decedent, who appears to have been a citizen of England, 27 years of age, was at work in the village of Massena, N. Y., when the accident occurred; he had the protection of the statute in so far as he was individually concerned, against any accident resulting in his disability. When the accident results in death, the benefits can only go to those who bring themselves within the provisions of sections 16 and 17 of the act. There is a presumption that the claim comes within the provisions of the act (section 21), but this presumption does not reach to the claimants; he or she must establish that the conditions exist which bring them within the statute. Under subdivision 4 of section 16 of the act, the death benefit, in the absence of surviving wife and children or dependent brothers and sisters under the age of 18 years, goes to the support of each parent, or grandparent, of deceased, if dependent upon him at the time of the accident; such benefit being limited to 25 per centum of such wages to each of the persons described.

[1, 2] The primary purpose of the statute, of course, is the protection of the individual workman and his immediate family; his collateral obligations, not of a legal character, are incidental, and it seems to us that persons who claim under the provisions of the Workmen's Compensation Law are bound to bring themselves within the language, at least, of the act. In other words, whether Charles Drummond is, in fact, the father of decedent; whether there is a surviving wife or children, or others, who are entitled under the statute; and whether he has been "supported, either wholly or in part, for the period of one year prior to the date of the accident"—are jurisdictional in their nature, and must be supported by evidence of probative character, in order to justify the taking of the money of the employer and insurance carrier. Primarily, the employer owes no legal obligation to the father and mother of a man of full age living in a foreign country; it is only by virtue of statute law that any right survives the death of the decedent in an accident of the character here under consideration, and until we know that Charles Drummond was "supported, either wholly or in part, for the period of one year prior to the date of the accident," there is no foundation for the award. A fact of this nature, if it exists, is capable of proof under ordinary circumstances; there certainly is no great difficulty in a man or woman telling the facts in reference to such alleged support, and there would seem to be no consideration of policy which required the State Industrial Commission of the State of New York to strain after an excuse for charging our industrial life with an expense in favor of a resident of England where the evidence does not meet the most ordinary requirements of proof.

The accident here under consideration occurred on the 19th day of September, 1917, and the period of investigation, therefore, goes back to the 19th day of September, 1916. We find in the record certain receipts for sums of money apparently sent to England from Massena; the first of these, within the period, being of November 9, 1916, for $48.70, and the second for the same amount, dated the 10th of February, 1917. It was more than six months after this last remittance that the accident occurred, but there is no evidence that any other or further remittance was made, and beyond this the receipts in evidence do not show that the decedent made these remittances, or that they were made to Charles Drummond. All that appears from these two receipts is that some one made two remittances to England at the dates mentioned, and the only connection established by the proof is that one John Hatton, administrator of the estate of Arthur Drummond, the deceased, makes an affidavit:

That "deponent found in the possession of said deceased, at the time of his death, certain postal money order receipts for money sent by said deceased to his parents in England through the Massena post office." And that "said deceased told deponent that he was sending money home to his parents in England to help support them and that deponent has

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been to the post office in Massena in company with said decedent and saw him purchase money orders and remit money to his said parents, but did not know the amount of such orders."

There is no attempt to identify the particular remittances within the period between September 19, 1916, and one year later when the accident occurred. There are several of the receipts in the record for small amounts running back to 1915, 1914, and the affidavit may be absolutely true, and yet not refer to either of the receipts within the year which alone is important here. So if we give all the force to the hearsay testimony that it can be entitled to under the most liberal rules, it does not meet the requirement of proof that the decedent made remittances to his father for the purpose of his support in whole or in part, during the year preceding the accident; and a loose, general affidavit of what the decedent may have told him is very far from the high character of evidence which is ordinarily necessary to take the money of one man and transfer it to another between whom there is not the slightest relationship. All contributions of money to the father of a family and the husband of a wife are in a sense for the support of the family, but the occasional contributions of an absent son are not, in ordinary usage, considered in this light, in the absence of facts which show that such contributions were relied upon as an element in the support of the family; and here we have no evidence whatever that any remittances were made by the decedent to the claimant during the year preceding the accident.

Turning then to the proofs offered from the other side of the water, we find the claimant writing the State Industrial Commission that—

"As to the proof that deceased supported me for at least a year prior to his death, I can only refer you to the declaration of my claim. I have not kept the letters from my son and as the money was sent by postal orders I have no means of proving the payment. * * * The deceased was the only son that we had who was not married and he lived with us up to the time that he went to America. He sent money to us in varying amounts but not at any set periods. The contributions from my son were of material assistance to me in the maintenance of myself and wife and in keeping the home together."

But no facts are given from which we may properly infer that the claimant relied upon these "varying amounts but not at any set periods," although the commission had written him telling him that—

"You are now asked to furnish in the form of a sworn statement as to the conditions surrounding your manner of living and as to whether you and your wife are living together. Also more definite information as to what assistance was rendered you by deceased and what use was made of the money forwarded."

The claimant evidently intends to be an honest self-respecting man. The commission tells him:

"If you can furnish us with this proof as to how much you and your wife really depended upon your son, and whether loss of this money will affect your standard of living, we think the carrier will waive his objections and pay the reward."

And under this appeal the claimant tells us in an affidavit that his son left England in 1913, and that he was then receiving £1, 4s., and 6d. a week, and paying 6s and 9d. a week rent; that he and his wife live together; and that "we have no other source of income except my own wages and money sent to me from time to time by my said son." It appears from the record that he has three other sons who are married, besides a married daughter, so that he has reared a considerable family upon the wages he has received, and he tells us that he receiv-

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ed during the war period an advance in his wages, and that he and his wife are entitled to a certain old age pension, which he has not been drawing, out of patriotic motives toward England. Much of the affidavit deals with matters since the death of the son, and he tells us in his affidavit of April, 1918, that owing to war prices "I and my wife could not have lived in ordinary decent comfort without the assistance we received from my said son who was in the habit of sending to me sums of ten pounds per quarter," and that the "money so sent to me was of great assistance to me and was spent exclusively in absolute necessities for our maintenance." But none of this comes to the matter in question; we are nowhere told that the decedent, in the year between September 19, 1916, and September 19, 1917, "supported, either wholly or in part," the claimant and without this fact there is nothing to build upon. The most that can be inferred from the affidavit is that the claimant is an honest and industrious Englishman holding a humble job, paying him a little better now than in years past, and that his son in America was in the "habit of sending to me sums of £10 per quarter"; but whether this habit persisted during the year in question is not disclosed, and there is no suggestion in the affidavit that the claimant was dependent upon these sums in that year. His affidavit speaks of the present time (April, 1918), some seven months after the son's death, for he tells us that—

"I am still engaged in the same work and I am now earning, with overtime and war bonus, an average of one pound fifteen shilling per week, but with my present rent 7 shillings per week and the increased cost of coal, light, food, shoes and clothing due to the war I and my wife could not have lived in ordinary decent comfort," etc.

But what the conditions were between the dates above mentioned is not shown, nor does it appear that any contributions were made during that time. It appears from another affidavit in the record that the claimant had worked for his then employers 27 years, and it is entirely obvious that he was receiving relatively the same compensation during 1916–17 that he was during all his life, and it requires some evidence to show that with a grown up family he was dependent upon these contributions of his son for the support of himself and his wife.

We find no evidence in the case which meets the requirements of the statute in reference to the support of the claimant, and as neither of these claims are within the provisions of the law, as the record stands, the award should be reversed, and the claim dismissed. All concur, except John M. Kellogg, P. J., dissenting.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

ABROMOWITZ

v.

HUDSON VIEW CONST. CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INDEPENDENT CONTRACTOR—"EMPLOYEE."

An awning remover, working for any one needing his services, who is engaged to do piece work for a house owner, who retains control and

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 187.

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direction of the work, with the right to discharge him for disobedience, is an "employee," and not an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW.

Award of Industrial Commission will be affirmed on appeal, where there is evidence to support finding upon which it is based.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Cochrane, J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Max Abromowitz for compensation for injuries, opposed by the Hudson View Construction Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. Award by State Industrial Commission for claimant, and employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Philip J. O'Brien and Alfred W. Andrews both of New York City (John N. Carlisle, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

LYON, J. The decision of this appeal depends upon whether the claimant was an employee of the Hudson View Construction Company or an independent contractor.

[1] The construction company was the owner and engaged in the maintenance and care of apartment houses in the city of New York, one of which was at 884 Riverside Drive. On such apartment houses were several thousand awnings, which were put up and taken down each year. On September 23, 1918, while the claimant was engaged in taking down an awning at 884 Riverside Drive, he lost his balance and fell from the third story to the ground, and sustained injuries which disabled him from working from that date to December 2, 1918, at which time he was still disabled. The State Industrial Commission awarded him compensation for 10 weeks at the rate of $15 per week, and continued the claim for further hearing. From such award this appeal has been taken.

From April, 1918, the claimant had been employed by Benjamin Feinberg, a manufacturer of window shades and awnings, as an awning hanger and remover, working by the day, and a greater part of the time at piece work. In September, 1918, Feinberg at the office of the construction company had a conversation, in which it was stated to him that the construction company wanted all the awnings removed from its apartment houses, and asked him if he could send the same man who took them off before. Feinberg said he did not know where the man was, but that he had a good man whom he could recommend, who would take the awnings down and charge them 10 cents an awning, because that is what he paid him. Feinberg told claimant of the conversation, and sent him to the construction company, telling him to go and look at the job, and see if he wanted to take it on himself. He went to the construction company and said to them that he was the man whom Feinberg had sent

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about the awnings, and Mr. Friedman, the representative of the construction company, told him to go ahead, and for each awning he removed he got 10 cents. He was told what house to work on. Claimant had pliers with him and went to work, and the eighth day the accident happened. He was taken to the hospital. He said no one came to see him, and he did not know who was responsible; and he called up Feinberg to ask him whom he worked for, and Feinbereg told him he was working for Freidman. The claimant testified he had worked for other people on the same terms, and after he had finished working for Freidman he would have gone back to Feinberg to find whether he had any work for him. The claimant had never worked for the construction company before. He could work such hours as he pleased. The construction company simply designated the houses where he was to take down awnings, and retained the right to discharge him in case he did not do his work properly. The claimant was not the regular employee of any person, but worked for any one needing his services. The claimant testified:

"I couldn't go and get anybody to put on the job, becausue Mr. Freidman would not let me. He could have discharged me at any time he wanted to."

[2] From the evidence in the case the commission could find that the Hudson View Construction Company retained the control and direction of the details and method of performing the work, and could discharge the claimant if he disobeyed its orders.

The commission having found that construction company was the employer, and there being evidence to support such finding, the award should be affirmed. All concur, except Cochrane, J., who dissents.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BREZZENSKI

v.

CRENSHAW ENGINEERING CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD FOR DEATH FROM SUNSTROKE—FINDINGS.

An award for an employee's death from sunstroke is not justified, where the Industrial Commission does not find that he met his death through exposure to heat more excessive than that to which others were subjected, or through any special hazard of the employment, but merely finds that he met his death from sunstroke arising out of and in the course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from State Industrial Commission.

Claim by Mrs. Jadwiga Brezzenski for compensation under the Workmen's Compensation Act for herself and children on account of

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 100.

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the death of Andrew Brezzenski against the Crenshaw Engineering Company, employer, and the Employer's Liability Assurance Corporation, Limited, insurance carrier. From an award of the State Industrial Commission in favor of claimant, the employer and insurance carrier appeal. Award reversed, and claim remitted.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg JJ.

Bertrand L Pettigrew of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Dept. Atty. Gen., of counsel), for Industrial Commission.

HENRY T. KELLOGG, J. The deceased became prostrated with the heat while at work along the tracks of an elevated railway, at about 4:30 o'clock in the afternoon of August 9, 1918, and died the following day. He had been engaged for many hours on the elevated structure, moving up and down in the full glare of the sun, carrying bolts and material to workmen, and flagging trains to warn them of repair work then in progress. It was 88 degrees Fahrenheit in the shade between the hours of 4 and 5 p. m. upon that day. The day, evidently, marked the conclusion of an intense heat wave, for on the 5th the maximum temperature was 91, on the 6th 93, on the 7th 102, and on the 8th 94. The commission found that the deceased came to his death from a heatstroke arising out of and in the course of the employment. In Campbell v. Clausen-Flanagan Brewery, 183 App. Div. 499, 171 N. Y. Supp. 522, it was said of a sunstroke case:

"The question is whether the deceased, by reason of his employment, was subjected to a special and increased hazard not common to the public in general, but because of the particular circumstances under which he was required to work."

After it had been remarked therein that the facts were undisputed, it was also said:

"It was a question of fact for the commission to determine whether the deceased was specially affected by the severity of the heat by reason of his employment."

In the case at bar the commission did not find that the deceased came to his death through exposure, by reason of his employment, to heat more excessive than that to which others were subjected, or through any special hazard of his employment. Therefore it did not make a finding of fact which, under the authorities, was necessary to justify an award. The case should consequently be remitted to the Industrial Commission for such further action as may be advised.

The award reversed, and claim remitted to the Industrial Commission for such further action as may be advised. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

O'ESAU

v.

E. W. BLISS & CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —FILING CLAIM WITHIN ONE YEAR JURISDICTIONAL.

Failure to file claim with the State Industrial Commission within one year from date of injury, as required by Workmen's Compensation Act, § 28, leaves the commission without jurisdiction, though the claim is filed less than a year after disability, and such failure cannot be disregarded on the theory that the employer, by continuing injured servant in service, is estopped to plead that the claim is barred.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from State Industrial Commission.

Proceeding by Martha O'Esau, as widow and as administratrix of the goods, chattels, and credits of John M. O'Esau, deceased before the State Industrial Commission for an award under the Workmen's Compensation Law on account of injuries sustained by deceased during his lifetime, opposed by the E. W. Bliss Company, employer, and the Ætna life Insurance Company, insurer. From the award, the employer and insurer appeals. Award reversed, and claim dismissed.

See, also, 186 App. Div. 556, 174 N. Y. Supp. 739.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

James B. Henney, of New York City (William H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

WOODWARD, J. The only question necessary to be considered here is whether the failure of the claimant to file a claim within the period of one year from the time of the accident may be disregarded, upon the theory that the employer, by continuing the employee in its service, worked an estoppel. On the 15th day of November, 1917, the State Industrial Commission made an award to John M. O'Esau, holding that the employer and insurance carrier were estopped to urge the provisions of section 28 of the Workmen's Compensation Law (Consol. Laws, c. 67). From this award an appeal was taken to this court, and at the March term in the present year it was urged that a certain letter, dated October 22, 1916, operated as a claim under the act. The case was sent back to the commission to make such findings as it should find proper, and it was then held that the letter in question constituted a claim, and an award was made. A further appeal from an order of this court confirming the award resulted in a dismissal of the appeal on the ground that it was not properly before the Court of Appeals with a distinct suggestion that the letter in question did not constitute a claim within the meaning of the

*Decision rendered, June 30, 1919. 177 N. Y. Supp. 203.

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statute. The case was then reconsidered by the State Industrial Commission, which made findings of fact in which, after pointing out the manner and extent of the injury, it was found that—

"(2) * * * Said injuries soon incapacitated him from doing his former work, but his employer retained him in the capacity of foreman, or overseer, and at the rate of wages earned prior to said accident. He was kept at work by his employer from the date of said accident to April 30, 1917, on which latter date he was discharged. From the date of said accident to April 30, 1917, during which time his employer retained him in a supervisory capacity, John M. O'Esau lost but three weeks on account of said injuries, and from the date of said accident to June 16, 1916, his employer furnished him with medical attention at the clinic located at the employer's plant.

"If he had not been retained by his employer as a foreman, or overseer, he would have been disabled from working from practically the date of said accident to November 15, 1917. Having been discharged by his employer on April 30, 1917, so far as a loss of wages is concerned, he was actually disabled from April 30, 1917, to March 21, 1918, the date of his death.

"(3) John M. O'Esau filed with the commission a claim for compensation on June 6, 1917, which was more than a year after the date of the actual injury received, but less than one year from the date of actual disability.

"(4) The conduct of the employer, in view of all the circumstances, and particularly in keeping the claimant employed up to April 30, 1917, for a period of more than a year after the date of said accident, at a rate of wages equal to the wages earned prior to said accident, and in furnishing medical attention for the period required by the Compensation Law, directly induced the claimant to delay in filing a claim for compensation until after the expiration of the statutory period, as set forth in section 28 of the Compensation Law."

Upon these findings of fact the commission decided that the—

"employer and insurance carrier are alike estopped to plead the statute of limitations in respect to the failure of the claimant to file his claim within one year after the injury, since, by the conduct of the employer, whether fraudulent or not, it has directly induced the plaintiff to delay in filing his claim for compensation with the commission until after the expiration of one year from the date of said accident."

Section 18 of the Workmen's Compensation Law requires that a notice must be served within 10 days, or the claim is barred, unless the commission shall, in a proper case, excuse such failure, and it has been held that the 10 days thus limited runs from the date of disability, not from the day of the accident; but we find no provisions of the statute which permits the State Industrial Commission to set aside the requirement of section 28 of the act. This section is not properly a statute of limitations; it is a condition of the right to compensation under the act. The claimant has no common-law right of compensation; this has been taken away, and a new right has been substituted, upon the conditions named in the act, and among these conditions is that the claim must be filed with the commission within the period of one year "after the injury," and not only is there no provision for the commission to excuse such filing, but it is provided in section 116 of the act that "no limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend," thus excluding all other cases under the rule of "expressio unius est exclusio alterius." Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 57, 57 N. E. 168, 79 Am. St. Rep. 565. No suggestion is made here that the claimant was mentally incompetent. The record clearly shows that he was not; and the statute

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provides that the "right to claim compensation under this chapter shall be forever barred unless within one year after the injury * * * a claim for compensation thereunder shall be filed with the commission." Section 28.

The rule is thoroughly well established that where a statute gives a right unknown to the common law, and limits the time within which an action shall be brought to assert it, the statutory limitation measures the extent and qualifies the nature of the right conferred. Dailey v. N. Y. O. & W. R. Co., 26 Misc. Rep. 539, 540, 57 N. Y. Supp. 485; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; Wooden v. W. N. Y. & P. R. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; Hill v. Supervisors, 119 N. Y. 344, 347, 23 N. E. 921. In the latter case the court says that, where the statute creates a new cause of action, "the limitation of time is so incorporated with the remedy as to make it an intergal part of it, and the condition precedent to the maintenance of the action at all." Rosin v. Lidgerwood Manufacturing Co., 89 App. Div. 245, 253, 86 N. Y. Supp. 49. "The right to claim compensation under this chapter is forever barred," says the statute, "unless within one year after the injury * * * a claim for compensation thereunder shall be filed with the commission." This is clearly a jurisdictional fact; without the filing of the claim within one year from the injury the commission is powerless to act because the right to "claim compensation" has been forever barred, and even the State Industrial Commission may not revive that claim sufficiently to give it jurisdiction to apply the doctrine of estoppel. What a court of law or of equity might do in a case coming within the scope of an estoppel, which always involves the element of fraud or something which operates as a fraud. (Wilmore v. Flack, 96 N. Y. 512, 520), it is not necessary now to inquire. The claimant worked for the employer for many months after the accident, during all of which time he was in the possession of all his mental faculties, as we must assume. He was bound to know the law, and this law required, as a condition precedent, that he should file his claim within a period of one year from the date of the accident. Having failed to do this, the "right to claim compensation under this chapter" was at an end. It was beyond the jurisdiction of the State Industrial Commission, and its holding that the employer and insurance carrier were estopped is utterly without force or effect. No evidence of fraud appears in the record; the employer furnished the claimant with work which he could do at his old wages following the injury, and there is not a suggestion that anything was done to prevent the claimant taking such action as his interests required.

The award appealed from should be reversed, and the claim dismissed. All concur.

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SUPREME COURT OF NEW YORK.

SPECIAL TERM, KINGS COUNTY.

LIVERANI

v.

JOHN T. CLARK & SON ET AL.*

1. ADMIRALTY — MARITIME TORT — DEATH ON SHORE — WORKMEN'S COMPENSATION ACT.

In view of Code Civ. Proc. § 1902, providing that an action for death by negligence is only maintainable when the party sued would have been liable to an action in favor of decedent, if death had not ensued, where stevedore is negligently injured on vessel, but dies from injuries on shore in state of New York, the tort is maritime, and his remedy is in rem in admiralty, or a common-law action, and the Workmen's Compensation Act could give no remedy.

(For other cases, Admiralty, Dec. Dig. § 20.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION—EFFECT—MARITIME TORT.

Election to proceed under the New York Workmen's Compensation Act to recover for death of stevedore, injured on vessel, but who died on shore, could not preclude common-law action, since Compensation Act could give no remedy.

(For other cases, see Master and Servant, Dec. Dig. § 353.)

Action by one Liverani, as administratrix, against John T. Clark & Son and another for death of plaintiff's intestate. On motion by defendants to set aside verdict for plaintiff. Motion denied.

KAPPER, J. Plaintiff, as administratrix, recovered a verdict against both defendants for the death of her intestate, which the jury found was occasioned by the negligence of the defendants, one of whom was the stevedore who was the employer of the intestate, and who was engaged in loading the steamship Sarnia belonging to the defendant steamship company; the other defendant being the owner of said steamship. An I-bolt broke, causing some tackle to fall upon the intestate, and his death ensued. Although his injuries were fatal, the actual demise did not take place until the following day in a hospital on shore, to which he had been removed. Both defendants moved to set aside the verdict. The employer stevedore does not participate in this motion by brief or argument, although an opportunity to do so was accorded upon request.

[1, 2] The defendant steamship company advances the two propositions: (1) That as the death occurred on shore, the cause of action then arose, and was not within the jurisdiction of the admiralty court, and that the plaintiff was therefore remitted to the exclusive remedy afforded by the Workmen's Compensation Law (Consol. Laws, c. 67), as to which see Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795, where it was held that a workman, injured or killed while engaged in a class of work to which the Workmen's Compensation Law applied, was limited in his rights and remedies to the compensation provided by that law; and (2) that by virtue of an award sought by the plaintiff from the Workmen's Compensation Commission the plaintiff

*Decision rendered, March 31, 1919. 176 N. Y. Supp. 725.

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had elected to so proceed, which election estopped her from maintaining this action at common law.

As to the first contention, its basis is a ruling in the case of Ryley v. Philadelphia, etc., Ry. (D. C.) 173 Fed. 839, where it was held that injury to a person caused by a collision on navigable waters, and which resulted in his death on shore, deprived the admiralty court of jurisdiction to award damages for the death. It is conceded that if the death of the intestate had been instantaneous, or had taken place on the ship, the common-law action was properly brought under the ruling of the United States Supreme Court in the cases of Southern Pacific Co. v. Jensen, 244 U S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and Clyde Steamship Co. v. Walker, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116, where it was held that stevedoring work on a ship was maritime in character, and that the Workmen's Compensation Commission was without jurisdiction to make an award that was binding upon the employer stevedore; exclusive jurisdiction in such cases vesting, according to the ruling, in the admiralty or common-law courts. That being so, it is sought to take the case out of this rule because the death did not occur on the ship; and the Ryley Case, supra, is, as stated, cited in support of that contention.

Apart from the cases to the contrary hereinafter cited, reasoning would not support such a contention, in my opinion. Under our statute (section 1902, Code Civ. Proc.), an action to recover damages for death by negligence is only maintainable when the party sued "would have been liable to an action in favor of the decedent by reason thereof if death had not ensued." The sole right of action vesting in the administrator is one that would have been maintainable only had the decedent himself survived and possessed a right of action. See Kelliher v. N. Y. Cent., etc., R. R., 212 N. Y. 207, 105 N. E. 824, L. R. A. 1915E, 1178; Littlewood v. Mayor, etc., of N. Y., 89 N. Y. 24, 42 Am. Rep. 271. The condition presented in the statute (section 1902, supra), that the wrongful act, neglect or default by which the decedent's death was caused must be such as would have entitled the party injured to maintain an action, has reference to the circumstances of the injury, and the character of the act including the question of contributory negligence. Littlewood v. Mayor, etc., of N. Y., supra.

Under the New York Workmen's Compensation Law there is given to the state or the insurance carrier a right of action against the wrongdoer for the amount awarded and paid out by or under the direction of the Compensation Commission. Consol. Laws, c. 67 (Laws 1914, c. 41) § 29. It is obvious that this right of subrogation must be based on a cause of action, and the alleged wrongdoer is not obliged to respond for the amount paid out of the insurance fund or by the insurance carrier, unless he would be legally liable for damages at common law. This, therefore, would necessitate common-law proof of negligence, and that, in the case at bar, would at once demonstrate that the injury ensued as the result of a maritime tort. And so, to say that the cause of action, having arisen upon the death of the decedent, was not, therefore, maritime in character, would, it seems to me, leave the state or the insurance carrier remediless, for the reason that proof of the cause of death would show that the same was due to negligence while the decedent was engaged in the performance of a maritime contract, and hence, under the ruling of the United States Supreme Court in the cases supra, the steamship company here, found by the jury to have been a joint wrongdoer with the employer, would be in the immediate position of asserting that the Workmen's Compensation Commission was without jurisdiction in the premises. So much for reasoning which, to my mind, soundly opposes the contention of the moving defendant at bar.

But reasoning apart, the moving defendant's proposition falls upon a consideration of other cases which it is enough to cite. That of The

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Chiswick, 231 Fed. 452, 145 C. C. A. 446, is controlling, as well as illustrative. It was there held that the injury of a stevedore, while employed in discharging a vessel, through the defective appliance furnished by the ship, constitutes a "maritime tort," and where death resulted after his removal from the ship, a remedy given by the state statute may be enforced and relief given in admiralty. Likewise, in the Anglo-Patagonian, 235 Fed. 92, 148 C. C. A. 586, it was held that the fact that a workman injured while at work in a boat was taken therefrom to a hospital on land, where he died, does not affect the jurisdiction of the admiralty court over a suit for his death, which is fixed by the place of the injury. See, also, The Strabo, 98 Fed. 998, 39 C. C. A. 375; Hamburg, etc., v. Gye, 207 Fed. 247, 124 C. C. A. 517; The Aurora (D. C.) 163 Fed. 633. None of these cases which oppose the ruling in the Ryley Case (supra) were brought to the attention of the court by counsel and it seems to me that they should not have been overlooked in the course of ordinary research.

As, therefore, the fact of the death on shore is not the test of jurisdiction in admiralty, but such jurisdiction is dependent upon the locus injuriæ, it is plain that the plaintiff did not possess a remedy under the Workmen's Compensation Law of the state of New York, and that she was limited in her procedure to the action in rem in the admiralty court or to her common-law action which is the one at bar. "The work of a stevedore in which the deceased was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. * * * In other words, the admiralty court has exclusive jurisdiction of maritime contracts, except in so far as the parties have common-law remedies which they may assert, and if an employee under a maritime contract receives an injury he must look either to the common law or to the admiralty jurisdiction for his remedy." Sullivan v. Hudson Nav. Co., 182 App. Div. 152, 162, 169 N. Y. Supp. 645, 651.

As to the second contention, whilst it is true that the plaintiff as well as the insurance carrier both proceeded upon the assumption that the remedy provided by the Workmen's Compensation Law was available, and that pursuant thereto an award and part payment had actually been made, the insurance carrier ceased to make further payments upon the rendition of the decisions in the Jensen and Walker Cases, supra. There was no estoppel by the plaintiff's election to so proceed, when she thought or was advised that that was the only relief obtainable, as the New York State Workmen's Compensation Commission was without jurisdiction to make such an award and either party was at liberty to refuse to act thereunder at any time. See Matter of Doey, 224 N. Y. 30, 120 N. E. 53; Sullivan v. Hudson Nav. Co., supra.

The motion is denied.

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SUPREME COURT OF OHIO.

THORNTON

v.

DUFFY ET AL. (No. 15999.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LEGISLATIVE POWER.

The enactment of the Workmen's Compensation Law (103 Ohio Laws, pp. 72-92) did not exhaust the authority conferred upon the General Assembly of Ohio by section 35 of article 2 of the Constitution. On the contrary, it has the power to amend or repeal all or any portion thereof at any time it deems proper.

(For other cases, see Master and Servant, Dec Dig. §347.)

2. MASTER AND SERVANT—STATE INSURANCE FUND—CONTRACTS OF INDEMNITY—LEGISLATIVE POWER.

Contracts of indemnity entered into between an employer of labor and an insurance company since the adoption of section 35 of article 2 of the Constitution are subject to the exercise by the General Assembly of the power so conferred upon it to compel all employers of labor to contribute to the state insurance fund, or to impose further conditions or restrictions upon the privilege of electing to pay compensation direct.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

3. MASTER AND SERVANT—PAYMENT OF COMPENSATION—CONSTITUTIONALITY OF STATUTE.

The act of March 20 1917 (107 Ohio Laws, pp. 157, 159), amending section 1465—69, Page & A. Gen. Code, is a valid and constitutional exercise of the authority conferred upon the General Assembly of Ohio by section 35 of article 2 of the Constitution of Ohio, and applies to all employers of labor mentioned in section 1465—60, General Code.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Error to Court of Appeals, Franklin County.

Petition for injunction by Frank C. Thornton against Thomas J. Duffy and another, as members of the Industrial Commission of Ohio, with answer and cross-petition by the Cleveland Stamping & Tool Company, praying for the same relief. General demurrers to such petition and answer sustained by the common pleas court, and from a judgment of the Court of Appeals, on appeal, awarding plaintiff, Thornton, a temporary restraining order and denying a perpetual injunction, and sustaining the demurrer to the answer and cross-petition, Thornton brings error. Affirmed.

The petition of Frank C. Thornton avers that he has in his employ more than 40 workmen and operatives regularly employed in the same business in and about his manufacturing establishment under contracts of hire.

That the defendants, Thomas J. Duffy and Herbert L. Eliot, are the duly appointed and qualified members of the Industrial Commission of Ohio, that there is a vacancy in the commission, and that the two persons

*Decision rendered, Dec. 31, 1918. 124 N. E. Rep. 54. Syllabus by the Court.

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named are the only members of the commission at the time of the filing of the petition.

That in January, 1914, upon evidence duly submitted, the Industrial Commission of Ohio made its finding of facts, certifying that plaintiff was of sufficient financial ability and credit to render certain payments in compensation to injured employees and dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention, services, and medicine, and funeral expenses, equal to or greater than is provided in the act of the General Assembly passed February 26, 1913. 103 Ohio Laws, p. 72.

That thereupon he gave bond with security approved by the commission, and paid the amount required into the state insurance fund, to be credited to the surplus provided for in paragraph 2 of section 1465—69 of the Page & A. General Code of Ohio (see 103 Ohio Laws, p. 80), and thereupon elected to pay individually such compensation and furnish such medical, surgical, nursing, and hospital services and attention and funeral expenses directly to the injured and dependents of the killed employees of plaintiff, as provided in section 1465—69. General Code, and has since that time continually abided by the rules of the Industrial Commission of Ohio, maintained the required bond and paid the required amount at its maturity credited to such surplus.

That since January ,1914, he has been and is now of sufficient financial ability and credit to render certain the payment of such compensation, and that the commission has not at any time changed, modified, or revoked its finding of fact, and the same is in full force and effect.

That in January, 1914, he made and entered into a written contract with the Ætna Life Insurance Company of Hartford, Conn., wherein the said company agreed to pay to the injured employees of plaintiff such amounts for medical, nursing, and hospital services and medicine, and such compensation as were and should be provided by section 1465—41a and section 1465—106, General Code, and amendments thereof, to indemnify this plaintiff against liability for the payment of any such amounts to injured employees or dependents of killed employees.

That the plaintiff agreed to pay the Ætna Life Insurance Company an estimated premium computed at an agreed rate upon the pay rolls of wages to be paid by plaintiff to his employees from April 29, 1914, to April 29, 1915, and a like amount annually thereafter until the contract of insurance should be cancelled in accordance with the terms written therein.

That by the terms of this contract either party thereto might cancel the same on and after 30 days' written notice to the other party of its intention to do so, but that otherwise the contract of insurance should continue in force indefinitely.

The petition also avers further facts in reference to additional premiums or rebates thereon, based upon the actual pay roll during the time the contract of insurance should be in force.

It avers that on the 1st day of December, 1917, the defendants, Thomas J. Duffy and Herbert L .Eliot, then composing the Industrial Commission of Ohio, adopted a resolution reciting the act of the General Assembly passed February 16, 1917 (107 Ohio Laws, p. 6), amending section 1465—101, General Code, and the act of the General Assmbly passed March 20, 1917 (107 Ohio Laws p. 159), among other things amending section 1465—69, General Code, and the act of the General Assembly of state of Ohio passed March 21, 1917 (107 Ohio Laws, p. 647), amending section 9607—2, paragraph 2, General Code, and declaring that no employers shall be permitted to pay or furnish directly to injured employees, or the dependents of killed employees, the compensation and benefits provided in sections 1465—41a to 1465—106, General Code if such employers shall, by contract or otherwise, provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify

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themselves against loss sustained by the direct payment thereof, and that all authorization on findings of fact theretofore issued by the commission authorizing and permitting such employers to pay or furnish such compensation and benefits direct, shall be and stand revoked as of January 10, 1918, as to all employers receiving such authorization who on the date January 10, 1918, carry such insurance.

That the Industrial Commission threatened to and will, unless restrained by the order of this court, send such notices and revoke and hold for naught the findings of fact so made and certified to this plaintiff that upon which plaintiff made his election to pay and furnish such compensation direct.

The petition further avers that the contract of plaintiff with the Ætna Life Insurance Company is a valid and subsisting contract; that plaintiff has the right to maintain the same until it shall, be canceled, as povided by its terms: and that the revocation of the finding of facts so certified by the commission to plaintiff, and the refusal of the commission to make and certify to plaintiff its findings of fact, as provided in section 1465—69, will cause plaintiff irreparable injury and damage, for which he has no adequate remedy at law.

The petition further avers that there are more than 675 employers of labor similarly situated, and many other employers who claim the right to make such contracts of indemnity; that it is impracticable to bring them all before the court, and that plaintiff sues for the benefit of all such employers.

That several acts mentioned in the resolution adopted by the Industrial Commission of Ohio on December 1, 1917, have no application to contracts of insurance or indemnity existing when these acts took effect, and were not intended, and do not authorize the commission to refuse, revoke, or cancel the authorization of employers to pay direct the compensation and benefits provided by law for the employees and their dependents, and that if said acts do apply to such contracts, they are in contradiction of section 1, article 14, and section 10, article 1, of the Constitution of the United States, and section 28, article 2, of the Constitution of Ohio.

Plaintiff prays that the Industrial Commission of Ohio be perpetually enjoined from sending such notices, and revoking, changing, or modifying such findings of fact made and certified by the commission to plaintiff, and from carrying out and perpetuating the resolution of December 1, 1917, from revoking, changing, or modifying its finding of fact for and on behalf of any employer who is of sufficient financial ability and credit to render certain the payment of compensation and the furnishing of services to employees and their dependents as provided in section 1465—69, General Code, and who maintains the bond required by the commission and abides by its rulings and pays the required amount into the surplus of the state insurance fund. Plaintiff prays for such other and further relief to which he may be entitled.

The answer and cross-petition of the Cleveland Stamping & Tool Company avers similar facts, and prays for the same relief.

To the petition of plaintiff and to the answer and cross-petition of the Cleveland Stamping & Tool Company the defendants filed general demurrers, which were sustained by the common pleas court. The cause was appealed to the Court of Appeals of Franklin county, Ohio, which court held that the plaintiff was entitled to a temporary restraining order enjoining the defendants as prayed for in his petition until the 29th day of April, 1918, and upon the facts stated in the petition not entitled to a perpetual injunction, and sustained the demurrer to the answer and cross-petition of the Cleveland Stamping & Tool Company.

This proceeding in error is brought in this court to reverse the judgmeent of the Court of Appeals.

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Judson Harmon, of Cincinnati, and Vorys, Sater, Seymour & Pease, of Columbus, for plaintiff error.

Joseph McGhee, Atty. Gen., and William J. Ford, Fank Davis, Jr., Timothy S. Hogan, and George B. Okey, all of Columbus, for defendants in error.

DONAHUE, J. [1, 2] Section 35, article 2, of the Constitution of Ohio, as adopted September 3, 1912, authorizes the General Assembly of Ohio to pass laws establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, for the purpose of providing compensation to workmen and their dependents, for death, injury, or occupational diseases occasioned in the course of such workmen's employment.

In pursuance of this authority the General Assembly enacted a Workmen's Compensation Law 103 O. L. 72-92. Section 22 of this act (sec-1465—41a to section 1465—106, General Code of Ohio and amendments employees under certain conditions might elect to pay individually, or from a benefit fund, department, or association, compensation to workmen and their dependents for death or injuries received in the course of employment.

Under the provision of section 35, article 2 of the Constitution, the General Assembly was not required to make any such exception in favor of any employer, but could have required every employer mentioned in subdivision 2 of section 13 of that act to pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards; if it could have done this, then undoubtedly it can at any time amend section 22 of that act by striking out such exceptions in favor of employers of sufficient financial ability to render certain the payment of compensation to injured employees, or to the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and servics, medicines, and funeral expenses equal to or greater than provided in the original act.

It necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such conditions as in its judgment seem wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provision under authority of which this law was passed.

It also follows that whoever seeks to avail himself of the benefits of this exception in his favor must comply with the conditions imposed. Verducci v. Casualty Co. of America, 96 Ohio St. 260, 117, N. E. 235.

While the contract of insurance described in the petition does not provide for any definite term, nevertheless, at the time it was made, it must have been within the contemplation of the parties thereto that they could not by contract limit the power of the General Assembly conferred upon it by section 35, article 2 of the Constitution, to withdraw this privilege or to limit it by other and further conditions that would render such contract of indemnity wholly useless to the employer.

The question is in every way analogous to the one arising in the case of Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, in which it was held by the Supreme Court of the United States. that—

"The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that, even valid when made, Congress may by exercising its power render them invalid."

To the same effect is the decision of the Supreme Court of Vermont

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in the case of Fitzgerald & Co. v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A.70. See, also Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Stone v. Mississippi 101 U. S. 814; Butchers' Union Co. v. Cresent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 Ls. Ed. 585; C. B. & Q. R. Co. v. Nebraska, 170 U. S. 58, 18 Sup Ct. 513, 42 L. Ed. 948.

But the question in this case does not depend merely upon the general authority of the Legislature to exercise police powers, but rather directly upon the constituional grant of power and the further consideration that the privilege granted to certain employers by section 22 of the Workmen's Compensation Act, to pay compensation direct, is an exception to the general provisions of that act, in their favor.

There is, therefore no reasonable hypothesis upon which to base a theory that a private contract, to continue for an indefinite number of years, could in any way prevent the Legislature from withdrawing this privilege or adding other and further conditions.

There is, however, a further provision in section 22 of the original act that seems to have been overlooked in the argument of this case. That provision (as amended, 107 O L 160) reads as follows:

"The Industrial Commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employees."

The experience of four or more years under Workmen's Compensation Law may have demonstrated to the entire satisfaction of this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct and have later entered into a contract with an indemnity company, by the terms of which, as averred in this petition, "The insurance company * * * agreed to pay to the injured employees of plaintiff such amounts for medical, nurse and hospital services and medicines and such compensation as were and should be provided by said act of the General Assembly comprised in section 1465—41a to section 1465—106, General Code of Ohio and amendments thereof and in the event of death of any of plaintiff's employees such amount as were and should be provided in said act and amendments thereof for funeral expenses and for compensation to the dependents or those partially dependent upon such employees."

While section 54 of thee Workmen's Compensation Law (section 1465—101, General Code), as it read prior to the amendment of February 16, 1917, undoubtedly permitted the writing of such a contract, nevertheless that section must be construed in connection with section 22 of the same act, which authorizes the Industrial Commission to change or modify its findings of fact provided for in that section, whenever in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of that act.

It therefore follows that the Industrial Commission would have the power under this provision of section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct, if it should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result, not only in avoiding a strict compliance with the provisions of the act, but also in some instances defeat its intent and purpose, especially where the injured employee or the dependents of an employee killed in the course of his employment are not fully advised of their rights under section

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27 of this act and rule 18 adopted by the Industrial Commission under authority of the act creating that commission.

[3] But the right of the Industrial Commission of Ohio to change or modify its former findings of fact does not now depend upon this construction of this paragraph of section 22. The amendment of March 20, 1917, of section 1465—69, General Code (107 O. L. 159), specifically limits the privilege of electing to pay compensation individually or from a benefit fund, department, or association, to those employers "who do not desire to insure the payment therof or indemnify themselves against loss sustained by the direct payment thereof," and therefore it becomes the duty of the Industrial Commission to change or modify its former findings of fact in reference to such employers, and make the same conform to the provisions of the amended section.

This added condition precendent to the exemption of certain employers from the general provisions of the act is not only clearly within the power of the General Assembly, but it is in furtherance of the purpose and intent of the Constitution and the law, to create and maintain one insurance fund, to be administered by the state, out of which fund compensation shall be paid to workmen and their dependents for death injuries or occupational diseases occasioned in the course of employment.

If insurance is desired, the state will furnish it out of the fund created and maintained for that purpose; for it would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts of insurance with private companies and compel all other employers to contribute to the state insurance fund, but it would also hinder and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such fund.

This is an action to enjoin the Industrial Commission of Ohio from revoking, changing, or modifying its findings of fact heretofore made by it in reference to the right of this plaintiff and the cross-petitioner to elect to pay compensation direct. Therefore the question of the constitutionalality of section 1465—101, General Code, as amended February 16, 1917 (107 O. L. 6) or the constitutionality of paragraph 2 of section 9607—2, General Code, as amended March 21, 1917 (107 O. L. 647), is in no wise important in the disposition of this case. If section 1465—69, General Code, as amended March 20, 1917, is a valid and constitutional act of the General Assembly of Ohio, and applies to all employers of labor mentioned in subdivision 2 of section 13 of the Workmen's Compensation Act, then the Industrial Commission not only has authority, but it becomes its duty to require all employers of labor to bring themselves within the terms and conditions before permitting them to exercise the privilege of election, regardless of the constitutionalty of the acts above mentioned.

Judgment affirmed.

Nichols, C. J., and Wanamaker, Newman, Jones, Matthias, and Johnson, JJ., concur.

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SUPREME COURT OF PENNSYLVANIA.

GALLAGHER

v.

P. M. WALTON MFG. CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —FINDING OF FACT BY COMPENSATION BOARD—REVIEW.

A finding of fact by the referee approved by the compensation board, to the effect that a deceased workman was engaged in the course of his employment at the time of the accident which resulted in his death, is one of fact, and will not be reviewed by the court.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceeding by Anna Gallagher against the P. M. Walton Manufacturing Company, employer, and the Manufacturers' Casualty Insurance Company, insurer, for compensation for the death of plaintiff's husband Harry Gallagher. From a judgment dismissing an appeal from an award of the Workmen's Compensation Board, defendants appeal. Appeal dismissed, and award affirmed.

Appeal from an award of Workmen's Compensation Board. The facts found by the referee were in part as follows:

On June 23, 1917, and for some time previous thereto, Harry Gallagher was in the employ of the defendant whose business was that of machine manufacturer, and whose place of business was at 1019-29 Germantown avenue, Philadelphia, Pa., as a driver, and in said employment on that date his wages were $14 per week, and were payable weekly. On the morning of June 23, 1917, Harry Gallagher had received instructions from his employer to go to Harrington's Seventeenth and Calowhill streets, and get some gear wheels; to go to the Hub Machine Welding & Contracting Company to get a brace to be welded; and to go to G. A. Hodson, 226 Arch Street, to get a pulley; and was also instructed to go to the Ericcson Line Pier, Pier 3, South, between Market and Chestnut streets in order to get some freight. He had left the stable with his team in the morning, and about 1 o'clock he stopped at the blacksmith shop of Mr. T. F. Gaffney, 911 North Second street, Philadelphia, at which he usually had his horses shod. There he met Charles F. Johns a friend of his, who was an employee of Mr. Gaffney. Johns got on the wagon, and they drove up Second street and west on Widley street, then through Widley street and another street around Berks street, then through Cambridge street and over Fourth street to Girard aveneue, and west on Girard avenue to Sixth street and Girard avenue in front of the Eagle Hotel, Where Dr. Delaney a veterinarian, resided and had his office. Gallagher had gone up here for the purpose of seeing Dr. Delaney for advice relative to the horses Gallagher and Johns got off the wagon and went into the bar with Dr. Delaney , where they had one drink, and, after stopping there a few minutes, they returned to the wagon, and Gallagher and Johns got on the wagon. They then drove west on Girard avenue to Darien street, and turned north on Darien street, and stopped at 1222 North Darien street, where Johns lived. They went into Johns' house and remained there about 25 minutes, sending out for a kettle of

*Decision rendered, Feb. 17, 1919. 107 Atl. Rep 327.

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beer. After that, they got on the wagon, turned the horses south on Darien street, and went south on Girard avenue, then east on Girard avenue to Fourth street, then south on Fourth street and over George street on their way directly to the defendant's place of business, which was at 1025 Germantown avenue, Philadelphia. After they had crossed Third street and were near Bodine street just east of Third street, Gallagher fell off the wagon and sustained certain injuries. When the wagon was returned to the defendant's place of business, it had on it all of the things for which Gallagher had been sent, except the freight from the Ericcson Line Pier.

In addition to being a driver, Gallagher took care of the stable, and ordinarily his work would be finished on Saturday at about 12 or 1 o' clock, and he would return in the evening to take care of the horses. At the time of the occurrence of the injury, Gallagher was in the course of his employment with the defendant. He had gone to the hotel to see Dr. Delaney in order that he might consult him with reference to the defendant's horses, of which he had charge; and, even if he might be considered that, in going to his friend's house on Darien street above Girard avenue, it was out of the direction in which he should have gone had he gone directly back to the place of business from the veterinarian's office, certainly, after he had returned to Sixth street and Girard avenue, and was proceeding from there to his employer's place of business, he had returned to the course of his employment. He had not relinquished his employer's team nor the goods which he was taking to his employer's place of business, and he was on his way to return his team and deliver the goods to his employer. He had no certain hours of employment. We are not ready to conclude that he had even left his employment when he had gone to his friend's house on the way back to the employer's place of business, but we feel that it is unnecessary for us to decide this question, for, as stated above even had he left the course of employment, certainly at the time of the accident he had returned to it.

As a result of the injuries sustained as aforesaid, Harry Gallagher died June 23, 1917, at the Roosevelt Hospital, Philadelphia, Pa.

The compensation board affirmed the above findings of fact.

The court dismissed the appeal from the order of the compensation board.

Argued before Brown, C. J., and Stewart, Frazer, Walling, and Simpson, JJ.

Archibald T. Johnson and Russell Duane, both of Philadelphia, for appellants.

Michael D. Hayes and Francis M. McAdams, both of Philadelphia, for appellee.

Per Curiam. The question whether the decedent was engaged in the course of his employmnt at the time of the accident which resulted in his death was one of fact. The findings of the referee, approved by the compensation board, was "at the time of the occurence of the injury Gallagher was in the course of his employment with the defendant." This is conclusive: Poluskiewicz v. Philadelphia & Reading Coal & Iron Co., 257 Pa. 305, 101 Atl. 638; Messinger v. Lehigh Valley R. R. Co., 261 Pa. 336, 104 Atl. 623.

Appeal dismissed and award affirmed.

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SUPREME COURT OF RHODE ISLAND.

DUFFNEY

v.

A. F. MORSE LUMBER CO. (No. 450.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —AWARD AS VESTED RIGHT.

Under Workmen's Compensation Act, art 2, §§ 6, 7, 8, 9, 23, compensation awarded a partially dependent mother for her son's death in employment is not a right vested in her, and does not pass over to her husband, as her administrator, though he also was awarded compensation as a partial dependent, but ceased with her death.

(For other cases, see Master and Servant, Dec. Dig. § 393.)

Appeal from Superor Court, Providence and Bristol Counties; John Doran, Judge.

Petition by George Duffney, as administrator of Emma Duffney his wife, to compel the A. F. Morse Lumber Company, the employer, to pay to him weekly compensation awarded the wife under the Workmen's Compensation Act for the death of their son, on whom they were partially dependent. From decree ordering such payments, the employer claims appeal. Appeal allowed, decree reversed, and cause remanded, with direction to dismiss the petition.

Gardner, Pirce & Thornley, of Providence, (Charles R. Haslam, of Providence, of counsel), for appellant.

James F. Murphy, of Pawtucket, and James M. Gillrain, of Providence, for appellee.

PARKHURST, C. J. This case comes before this court upon the respondent's appeal from a decree of the superior court. By this decree the respondent was ordered to pay the petitioner, as administrator of the estate of Emma Duffney, his wife, weekly compensation at the rate of $2 a week, beginning January 16, 1918, until the expiration of the period of 300 weeks from December 11, 1916, the date of the injury of the deceased employee, Dave Duffney, which payment would have been payable to Emma Duffney, if she had lived, under the Workmen's Compensation Agreement No. 6510, filed in superior court February 1, 1917, and approved by the superior court on February 8, 1917.

By the terms of this agreement, it appears that George Duffney and Emma Duffney, his wife were the parents of Dave Duffney, the deceased employee, were partially dependent upon his earnings for support at the time of his death, and payment of $2 a week were agreed to be paid by the said respondent as employer to each of the said partial dependents, "to begin as of December 11, 1916, and to continue for a period not to exceed 300 weeks from December 11, 1916." Under this agreement, payments of $2 a week were made to each of these partial dependents from December 11, 1916, to January 9, 1918, on which date Emma Duffney died. During that period of time the respondent took from each of the said dependents separate receipts for the weekly payments of compensation of $2.

*Decision rendered, July 1, 1919. On Petition for Reargument, July 10, 1919. 107 Atl. Rep. 225.

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Since January 9, 1918, the employer has paid to the said petitioner under this agreement the sum of $2 weekly, but has refused to pay to him the weekly payments of $2 formerly made to Emma Duffney. In June, 1918, the petitioner as "a dependent" brought a petition against the respondent, claiming that he was entitled to the compensation formerly paid to his wife under the agreement on the ground that he was the sole surviving dependent of his son, Dave Duffney, and also on the ground that the right of Emma Duffney to compensation under the agreement was a vested one and passed to him as her "surviving husband"; and accordingly, he prayed for the enforcement of the agreement so that this weekly sum of $2 formerly paid to Emma Duffney should be paid to him for the balance of the compensation period. This petition was heard before Mr. Presiding Justice Tanner, who filed a rescript denying the petition on the ground: First, that even if the right of Emma Duffney to compensation under the agreement was a vested one, yet it did not pass to the petitioner because he had not been appointed administrator; and, secondly, because the mere survivorship of the petitioner did not entitle him to all the compensation payable under the agreement to himself and wife.

Later, on January 4, 1919, the petitioner filed an amended petition subtantially to the same effect as the former one, except that it was alleged that George Duffney had been appointed administrator of the personal estate of Emma Duffney, his wife and had given bond to pay the debts of his wife, and was therefore "entitled to demand and recover as his own property, the remaining weekly sums of $2 each accruing after the death of said Emma Duffney under said memorandum of agreement." This amended petition was heard before Mr. Justice Doran, who rendered a decision in which he held that the right of Emma Duffney as partial dependent under the compensation agreement was a vested one and upon her death passed to the petitioner as administrator of her estate. Thereafter a decree was entered by Mr. Justice Doran in which it was decreed as follows:

"(1) That the said petitioner is not entitled to said compensation formerly paid to his wife, Emma Duffney, under said agreement as surviving dependent.

"(2) That the right of the said Emma Duffney to compensation under said agreement was a vested right which survived her death and passed to the said petitioner as administrator of her estate.

"(3) That, as administrator of the estate of Emma Duffney, the said petitioner is entitled to receive compensation at the rate of $2 per week beginning January 16, 1918, until the expiration of the period of 300 weeks, beginning December 11, 1916, the date of the injury to the said Dave Duffney, deceased, which said payments would have been payable under said agreement to the said Emma Duffney if she had lived."

To this decree the respondent duly filed its claim of appeal and reasons therefor and has duly prosecuted its appeal to this court, and this appeal is now before us.

The principal question, decisive of this case, is whether or not the right of Emma Duffney (mother of the deceased employee, and a partial dependent upon him at the time of his death) to receive $2 per week as compensation under the agreement was vested in her and passed to her administrator upon her death.

The provisions of the "Workmen's Compensation Act" of Rhode Island, being chapter 831, Pub. Laws, January, 1912, p. 424 et seq., which are important in this case, may be briefly stated as follows: By the terms of section 6 of article 2 of our Workmen's Compensation Act, it is provided that, in case the employee dies as a result of the injury, the employer shall make certain payments to his dependents. If the dependent to whom the compensation shall be payable is the widow of the employee, then it is provided that—

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"Upon her death the compensation thereafter payable under this act shall be paid to the child or children of the deceased employee, including adopted and stepchildren, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, dependent upon the widow at the time of her death."

It is also provided that—

Where weekly payments have been made to the injured employee before his death, then "the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than 300 weeks from the date of the injury: Provided, however, that if the deceased leaves no dependents at the time of the injury, the employer shall not be liable to pay compensation under this act except as specifically provided in section 9 of this article."

Section 9 provides that, where an employee dies leaving no dependents at the time of his injury, then the employer shall pay the reasonable expense of his last sickness and burial, which shall not exceed $200.

It is also provided in section 7 of article 2 that in all cases except those of a dependent wife, husband or children, "questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury"; that, "if there is more than one person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent"; and that, "if there is no one wholly dependent and more than one person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency."

Another section of the act relative to the question at issue is section 8, art, 2, which provides that—

"No person shall be considered a dependent unless he is a member of the employee's family or next of kin, wholly or partly dependent upon the wages, earnings or salary of the employee for support at the time of the injury."

Section 23 provides that—

"No claims for compensation under this act, or under any alternative scheme permitted by article 4 of this act, shall be assignable, or subject to attachment, or liable in any way for any debts."

There is no express provision of the act for the further or future payment of any sum of money awarded to a partial dependent, such as was the mother of the deceased employee in the case at bar, after her death, to any other person (such as exists in case of the dependent widow leaving children within certain ages and conditions).

No case in this state has dealt with this question, but it has been passed upon in other jurisdictions. In Murphy's Case, 224 Mass. 592, 113 N. E. 283, under the Massachusetts act (St. 1911, c. 751, as amended), which in essential respects is similar to ours, the sole dependent of the deceased employee was his mother, and she died while her claim for compensation was pending. After her death, her administrator intervened, and the industrial accident board made an award of compensation based on total dependency, and the superior court confirmed this award and ordered that compensation should be paid to the administrator for the period of 300 weeks under the Massachusetts Compensation Act. The Supreme Judicial Court, in reversing this decision, held that the estate of the dependent mother was entitled to compensation from the date of the injury to the date of her death, but that her administrator had no right to further compensation, since the right of the dependent mother to compensation was not a vested right which passed to her legal representatives. The court said, at page 594 of 224 Mass., at page 284 of 113 N. E.:

"To hold that the dependent's right to compensation is a vested right,

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which passes to a legatee by will, and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed, the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the business in which he was employed.

"The opposite result has been reached in England and in Ohio. But both those decisions were founded on provisions of the acts there in question which were not like the provisions of our Workmen's Compensation Act. The decision in United Collieries, Ltd., v. Simpson (1909) A. C. 383, was based upon the provision of the English act that in case the employee was killed a lump sum should be paid to those dependent upon him. * * * The decision in Ohio (State v. Industrial Commission of Ohio, 92 Ohio St. 434, 436, 437 [111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162]) was founded on a provision of the act that in the case of persons wholly dependent 'the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of injury.' This provision, construed in the light of the report of the commissioners, was held by the court to mean what by a literal interpretation of its words it provided.

"For these reasons, we are of opinion that, although there is no express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies."

In Bartoni's Case, 225 Mass. 349, 353, 114 N. E. 663, L. R. A. 1917E, 765, the Massachusetts court, following Murphy's Case, supra, held that under the Workmen's Compensation Act the right to a weekly award for the death of a deceased employee is not vested absolutely in his widow, but continues only during her life and ceases with her death. In the Massachusetts act there is no provision, as in ours, that, in the case of the death of a dependent widow, the compensation shall thereafter be paid to the children of the deceased employee, dependent upon her for support at the time of her death.

The two cases above cited were referred to and approved by the Massachusetts court in Bott's Case, 230 Mass. 152, 119 N. E. 755, where it was held that a widow awarded compensation for the death of her husband is not barred from receiving further payments as a dependent upon her remarriage, although the remarriage renders her no longer dependent for her support upon the payments received under the act. On page 154 of 230 Mass., on page 755 of 119 N. E., the cout said:

"It was held in Murphy's Case, 224 Mass. 592 [113 N. E. 283], that the right to payments under the act was not vested, and ceased upon the death of the dependent. But that decision does not reach to the point here raised. Its reasoning, in brief, was that there was no provision in the act for payment to be made to anybody save to the dependents therein named, and nothing to indicate a purpose that the payments be made to the personal representative of dependents in case of their death, and that to treat the right to such payments as passing to their executors or administrators often would or might result in payments to persons in no way connected with the deceased employee, or his family or kindred, and this might deprive some of his kindred in truth dependent upon his wages for support of any payment under the act. The practical justice of that decision is illustrated by Bartoni's Case, 225 Mass. 349, 354 [114 N. E. 663, L. R. A. 1917E, 765]. The word 'dependents' as matter of construction did not seem rationally susceptible of including their personal representatives in case of their death, in view of the context of the act and its general purpose. That reasoning does not apply to the case at bar"

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Bott's Case, supra, was cited with approval by this court in Newton v. Rhode Island Co., 42 R. I. 58, 63, 105 Atl. 363, 365. This Massachusetts case clearly shows that the question decided by this court in Newton v. Rhode Island Company, supra, is quite different from the one involved here, and consequently that case is not an authority in point here, as contended by the petitioner.

To the same effect, that the right to compensation awarded to an injured employee or to dependents is not a vested right and does not pass to a personal representative under Workmen's Compensation Acts of a nature substantially similar to our own, see, also, Erie Railroad Co. v. Callaway, 102 Atl. 6 (right of employee himself); Ray Adm'r v. Ind. Ins. Com., 99 Wash. 176, 178, 168 Pac. 1121, L. R. A. 1918F, 561 (right of employee himself); Lahoma Oil Co. v. State Ind. Com. of Okl., 175 Pac. 836, 837 (right of employee himself); Wozneak v. Buffalo Gas Co, 175 App. Div. 268, 161 N. Y. Supp. 675, 679 (right of employee himself); Matecny v. Vierling Steel Works, 187 Ill. App. 448, 458 (dependent mother); Corcoran v. Farrel Foundry & Machine Co., 1 Conn. Comp. Dec. 42, 44, pars. 24, 25 (dependent mother); Ledford v. Casper Lumber Co., 2 Cal. Ind. Acc. Com. 679 (dependent mother).

Counsel for petitioner in their brief cite only a few cases under compensation acts in support of their position that the award of compensation to the dependent mother in this case was vested in her and at her death passed to her administrator. Most of them are not in point. Thus, Wangler, etc., Co. v. Ind. Com., 287 Ill. 118, 122 N. E. 366, and Hansen v. Brann & Stewart Co., 90 N. J. Law, 444, 103 Atl. 696, support the doctrine laid down by this court in Newton v. Rhode Island Co., 42 R. I. 58, 105 Atl. 363 (supra), that a widow receiving compensation as a dependent does not forfeit the same by remarriage. Roma v. Ind. Com., 97 Ohio St. 247, 119 N. E. 461, has no bearing on this case. Smith v. Southern Surety Co. (Tex. Civ. App.) 193 S. W. 204, has no application; the provisions of the Texas act are radically different, the scheme and method of payment are entirely different; it is held that a temporary administrator of a deceased employee cannot recover because the plain terms of the act point out the destination of the compensation in case of the death of the injured employee. Re Constantine Towle, Op. Sol. Dept. of Labor, p. 565, is under the federal Compensation Act, and, so far as it goes, is against the petitioner, in that it finds that when the dependent widow of a deceased employee, having received an award, died one week thereafter, the amount accrued between the death of the employee and her death became a part of her estate. This Towle Case is incorrectly stated in Bradbury's W. C. L. (3d Ed.) 803, 804, also cited by petitioner, which probably accounts for the citation of this case by the petitioner. Monson v. Battelle, 102 Kan. 208, 170 Pac. 801, simply holds that a lump sum judgment in favor of an injured workman under the Workmen's Compensation Act does not abate by his death, but may be revived in the name of an administrator. It appeared in that case that before the death of the injured workman there had been a judgment entered in his favor, commuting all future payments of compensation to a lump sum and pending the appeal by the employer, which was later denied, the employee died. The court said, at page 210 of 102 Kan., at page 802 of 170 Pac.:

"In the present case, the plaintiff had obtained an absolute personal judgment requiring the immmediate payment of a fixed amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made, the money would have been wholly at the disposal of the plaintiff. If the final result is an affirmance, it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having

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taken an appeal which is ultimately determined not to have been well founded."

The petitioner also cites in support of his contention United Collieries, Ltd., v. Simpson (1909) A. C. 383, a Scotch case on appeal in the House of Lords under the English act of 1906 (see, also, 2 Butt. W. C. C. 308); and the case of State v. Industrial Com. of Ohio, 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162. Both of these cases were cited by the Massachusetts court in Murphy's Case, 224 Mass. 592, 594, 113 N. E. 283, from which we quote, supra. These cases have been fully examined, and we are of the same opinion as was expressed in Murphy's Case with regard to the difference between the several acts under consideration. We do not find either in the English case or in the Ohio case any aid or controlling value in determining the true construction of our own act.

We find upon the petitioner's brief a large number of cases cited relating to the vesting of various kinds of incorporeal hereditaments or property rights or interests, such as rights under patents, ferry franchises, water rights and rights of flowage, annuities under wills or trusts, alimony, rights under contracts, etc., from which petitioner seems to endeavor to draw arguments by way of analogy in support of his claim that his wife had a vested interest in the compensation agreed to be paid to her in this case. A great number of these cases have been examined; but we do not find in them any support for the petitioner's contention or any aid in the construction of the act here under consideration, and there is no occasion to refer to any of them more particularly.

After due consideration of all the cases cited, we find that the weight of authority, under acts, similar to our own, is against the petitioner; that the compensation agreed to be paid to the dependent mother was not vested and did not pass over to her administrator, but ceased with her death.

We therefore hold that the decree appealed from was erroneous and should be reversed.

The appeal is allowed, the decree appealed from is reversed, and the cause is remanded to the superior court sitting in Providence county, with direction to dismiss the petition.

On Petition for Reargument.

The petitioner's petition for reargument, filed July 7, 1919, is denied and dismissed.

COURT OF CIVIL APPEALS OF TEXAS.

BEAUMONT.

TEXAS EMPLOYERS' INS. ASS'N

v.

BOUDREAUX ET AL. (No. 467.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD IN GROSS—TRAIL DE NOVO ON APPEAL.

Under Compensation Act, pt. 1, §§ 8a, 15, 18, providing that compensation shall be paid weekly, except that Industrial Board may redeem liability by payment in gross where manifest injustice would result from

*Decision rendered, May 31, 1919. Rehearing Denied June 18, 1919. 213 S. W. Rep. 674.

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weekly payment, district court, on review of an award of weekly compensation, trying case de novo, as provided by Vernon's Ann. Civ. St. Supp. art. 5246, may give a gross award in case of death of employee having wife and two children of scholastic age, and no earning capacity, award for whom would amount to but $7.44 a week.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

2. MASTER AND SERVANT—AWARD IN GROSS—REVIEW OF DISCRETION OF TRIAL JUDGE.

Discretion of district court in award of compensation in gross on trial of cause de novo, on review of an award of weekly compensation by Industrial Board, will not be disturbed on further appeal.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

3. MASTER AND SERVANT—COMPENSATION ACT—APPORTIONMENT OF AWARD—"DESCENT"—COMMUNITY PROPERTY.

Compensation Act, pt. 1, § 8a, providing that beneficiaries in case of death of husband will take by law of descent, means descent relating to community property, and not per capita, as provided by law of descent relating to separate property, especially since the Industrial Board construed the law that way immediately after its passage, and many cases have been decided on that theory.

(For other cases, see Master and Servant, Dec. Dig. § 386[5].)

(For other definitions, see Words and Phrases, First and Second Series, Descent.)

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Proceedings under Compensation Act by Mrs. Regina Boudreaux for death of her husband, opposed by the Gulf Production Company, subscriber, and Texas Employers Insurance Association. From an award of weekly sum by Industrial Board, made award in gross by district court on review, insurance association appeals. Affirmed.

Harry P. Lawther, of Dallas, for appellant.

Gremillion & Smith, of Crowley, La., and Crook, Lord, Lawhon & Ney, of Beaumont, for appellees.

BROOKE, J. The following statement of the nature and result of this suit is agreed to by both sides, to wit:

July 28, 1917, one Israel Boudreaux died as a result of injuries sustained by him at Goose Creek, Harris county, Tex., on the 18th day of July, while in the employment of the Gulf Production Company. On said day of July the Gulf Production Company was a "subscriber" under the provisions of the Employers' Liability Act (Acts 33d Leg. c. 179), as amended by Act 35th Leg. 1917, c. 103, and carried a policy of compensation insurance with the Texas Employers' Insurance Association.

Israel Boudreaux left surviving a wife, Regina Boudreaux, and their two minor children, Idez and Louise Boudreaux. Said wife and children, together with a child by a former marriage, Mary Seppe Broussard, as beneficiaries, under section 8a, part 1, of the Act, made claim for compensation.

On said claim the Industrial Accident Board made the following award:

"November 16, 1917.

Israel Boudreaux, employee, v. Gulf Production Co, employer. C—8332
"Texas Employers' Insurance Ass'n Insurer.

"On this the 16th day of November, 1917, after due notice to all parties at interest, came on to be considered by the Industrial Accident Board the above styled and numbered claim.

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"It appearing that the questions involved herein have not been settled by agreement of the parties, the board, as provided by law, finds:

"(1) That on July 18, 1917, the Gulf Production Company was a subscriber to the Employers' Liability Act, and on that date carried a policy insurance with the Texas Employers' Insurance Association.

"(2) That on said 18th day of July, 1917. Israel Boudreaux was in the employ of the Gulf Production Company, and as such employee was covered by said policy of insurance.

"(3) That on said date, and while so employed and so covered by said policy of insurance, as above stated, the said Israel Boudreaux sustained injuries which resulted in his death on or about July 28, 1917.

"(4) That the injuries sustained by the said Israel Boudreaux producing his death were so sustained by him while engaged in the course of his employment, and under circumstances creating a liability on the part of the insurer for compensation because of his death.

"(5) That the said Israel Boudreaux, now deceased, left surviving as his legal beneficiaries at the time of the injury and death, and at the time of the making of this order, who are entitled to receive the payment of compensation benefits, a wife, Mrs. Regina Boudreaux, and children, Idez Boudreaux, Louise Boudreaux, and Mrs. Mary Seppe Broussard; and the said Mrs. Regina Boudreaux, surviving widow of the deceased, is entitled to receive the payment of one half of the compensation, and the said named children are entitled to receive payment of equal portions of the other half of said compensation.

"(6) That the average weekly wage of the said Israel Boudreaux was the sum of $18.57 per week, 60 per cent. of which sum is $11.15, and the sum of $11.15 is found to be the weekly compensation to which the above-named beneficiaries are entitled to have paid to them by weekly payments as the same accrues.

"(7) That Gremillion and Smith, of Crowley, La., and Crook, Lord, Lawhon & Ney, of Beaumont, Texas, were employed as attorneys to represent, and did represent, before the Industrial Accident Board of the state of Texas, the legal beneficiaries, Mrs. Regina Boudreaux and the said Idez Boudreaux and Louise Boudreaux, in presenting their claim for compensation, and that the services so rendered by the attorneys named in prosecuting said claim for compensation and obtaining an award therein insured to the benefit of Mrs. Mary Seppe Broussard.

"(8) That the said Gremillion & Smith and the said Crook, Lord, Lawhon & Ney are entitled to receive payment for their legal services rendered in connection with presenting the claim before said board and prosecuting the same to award from the Texas Employers Insurance Association an attorney's fee equal to 15 per cent. out of the first $1,000 awarded under this order to the said legal beneficiaries named, and a further sum equal to 10 per cent. of the amounts paid by virtue of said award in excess of said sum of $1,000, and the sums found for the said attorneys to be paid out of the weekly compensation benefits accruing to the beneficiaries named from week to week as the same accrue.

"It is therefore ordered, adjudged, and decreed by the Industrial Accident Board that the Texas Employers' Insurance Association pay unto the said Mrs. Regina Boudreaux, and the said Idez Boudreaux, Louise Boudreaux, and Mrs. Mary Seppe Broussard, the sum of $11.15 per week from July 18, 1917, up to and including this the 16th day of November, 1917, in the proportions awarded to each of said beneficiaries, and that it continue to pay to the said beneficiaries the said sum of $11.15 per week in the future, in accordance with the provisions of this award, as long as they are the legal beneficiaries of the said Israel Boudreaux, deceased, entitled to receive the payment of said compensation benefits, for a period of 360 weeks from and after July 18, 1917, less 15 per cent. of said weekly sums on the first $1,000 paid hereunder, and less 10 per cent. of all weekly sums paid hereunder in excess of $1,000, which said

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15 per cent. of said sum of $1,000 paid in weekly sums, and 10 per cent. of the sum paid hereunder in excess of said $1,000 paid in weekly sums, it is further ordered, adjudged, and decreed by the board be paid to the said Gremillion & Smith and Crook, Lord, Lawhon & Ney."

November 30, 1917, the Texas Employers' Insurance Association filed suit in district court of Harris county, under section 5, pt. 2, of the act to set aside said award. March 5, 1918, all the matters of fact as well as of law being submitted to the court, said district court rendered judgment setting aside the award of Industrial Accident Board but in favor of the said Regina Boudreaux and her two minor children, and against the said Texas Employers' Insurance Association, for a lump sum of $3,446.75, less one-third, for which judgment was rendered in favor of the atorneys representing said beneficiaries under section 7d, pt. 1, of the Act, and distributing the $2,297.85 awarded to the widow and minor children one-half to the widow and one-half to the children. Appellant gave notice of appeal, and has perfected its appeal to this court by supersedeas bond.

There are in this record two assignments of error. The first is as follows:

"The court erred in adjudging that the instant case was a special one where manifest hardship and injustice would otherwise result, unless the association was compelled to redeem its liability by a payment of a lump sum; and in rendering judgment in favor of the said Mrs. Regina Boudreaux, individually and as next friend for her two minor children, Idez and Louise Boudreaux, and against the said Texas Employers' Insurance Association, for the lump sum of $3,446.75, less one-third of said sum of $1,148.90, for which later judgment was awarded in favor of Gremillion & Smith and Crook, Lord, Lawhon & Ney, attorneys, and against the said Texas Employers' Insurance Association.

Under this assignment there is this proposition:

"Section 18, part 1, of the act, provides: 'It is the purpose of this act that the compensation herein provided for shall be paid from week to week and as it accrues, and directly to the person entitled thereto, unless the liability is redeemed as in such cases provided elsewhere herein.'

"In section 8a, part 1, it is provided: 'And the compensation provided for in this act shall be paid weekly to the beneficiaries herein named and specified, subject to the other provisions of this act.'

"Section 15, part 1, of said act, provides: 'In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board hereinafter created. This section shall be construed as excluding any other character of lump sum settlement save and except as herein specified; provided, however, that in special cases where, in the judgment of the board, manifest hardship and injustice would otherwise result, the board may compel the association, in the cases provided for in this section, to redeem their liability by payment of a lump sum as may be determined by the board.'

"There was no agreement of the parties here; the Industrial Accident Board awarded compensation in weekly payments so that in its judgment this was not a special case where manifest hardship and injustice would result from such manner of payment; and the facts of the case, as disclosed by the record, show that we have here no case where manifest hardship and injustice would otherwise result unless the association was compelled to redeem its liability by payment of a lump sum."

There was no agreement of the parties for a lump sum settlement. The testimony of Mrs. Regina Boudreaux, the only witness on this point, testified:

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"My little girls have not got any property. They have no means of living but the living I give them. I make a living for them by running a rooming house. I have just been doing that since Christmas. I am a dressmaker, and used to sew. Since my husband's death I have sewed as a seamstress, and have supported my children that way. My children have no income from any other source, and I have no income from any other source. My husband was working in Texas for a year when he got killed; I do not know for whom he was working. During that year my husband did not send me any money. My husband was gone on his work; he was working for the last seven years. He had not quit me that I know of. I had not been making a living for myself and my children for seven years. Every time my husband come home he gave me all the money he had. During those seven years sometimes he stayed away three or four months before he came home. He never did stay as long as three years. The longest time he stayed was one year; that was not the year just before he got killed. When he got killed last July it was four months since he had been at home. He had been working in Texas a year, but he came home twice during that year. My husband did not leave me and go to New Orleans and stay nearly three years. He stayed at New Orleans, but I was staying there with him too. My husband had not quit me, and I had not quit him, for as much as three years before he died. I know that. There had been no separation. I had not abandoned him, and he had not abandoned me, for the space of three years before his death; he was just going on working. When my husband was away from me over here in Texas I do not know what he did with his money. He did not send me money, but every time he came home he gave me all that he had. The last time he came home he gave me seventy-five dollars."

Section 15, pt. 1, of the Compensation Law, makes provision for lump sum compensation in two ways: (a) Under agreement of the parties subject to the approval of the Industrial Accident Board; and (b) where, in the judgment would result, in which case the board may compel the association to redeem its liability by payment of a lump sum in an amount to be determined by the board. The first depends upon the agreement of the parties; the second upon the discretion of the Industrial Accident Board upon any given case.

The Compensation Act provides (article 5246—44, Vernon's Texas Statutes, 1918 Supplement):

"If the final order of the board is against the association, then the association, and not the employer, shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo, and the burden of proof shall be upon the party claiming compensation. In case of recovery the same shall not exceed the maximum compensation allowed under the provisions of this act."

The average weekly wage of Israel Boudreaux, deceased, was $18.57 per week, 60 per cent, of which sum is $11.15, which was found by the Industrial Accident Board and by the court to be the weekly compensation that would arise on account of the death of Israel Boudreaux, resulting while in the course of his employment. The Compensation Law provides for an attorney's fee, in case of suit, of one-third of the amount of compensation awarded. This one-third in this instance would be $3.71 out of each week's compensation, which would leave $7.44 to be shared by the surviving wife, Mrs. Regina Boudreaux, and her two minor daughters. The wife would be entitled to half of this amount, under our interpretation of the Compensation Law, which will be hereinafter discussed, and the two daughters would be entitled to the other half, or $3.72 per week, or $1.86 each per week. The proof showed these two daughters to be within the scholastic age and that they were attending school. It appeared that they had no earning ability whatever.

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The Legislature must have intended to leave the matter of lump-sum settlement to the judgment of the Industrial Accident Board. The expression, "Provided, that in special cases where, in the judgment of the board, manifest hardship and injustice would otherwise result, the board may compel the association * * * to redeem their liability by payment of a lump sum," seems to be intended to leave the matter as flexible as possible, so that the judgment of the board can be exercised freely for the relief of those who might otherwise suffer an injustice. This provision, evidently, was intended to have application in cases where the needs are great and the compensation small. It seems to us that nothing else could have been intended.

In the present case we have one in which two young girls have no means of support except what little their mother may be able to furnish by running a rooming house, and the revenue arising therefrom is not shown, but it may be naturally assumed that the profits from such an enterprise are meager. When we take into consideration the high cost of living of the present time, and the ever changing conditions and vicissitudes incident to the life of a widow with a family to support, it occurs to us that the lower court was correct in concluding that a lump sum ought to be awarded in this case, rather than a weekly compensation, which would give each of these little girls $1.86 per week. This being a case in which hardship would result, justifying the award of a lump sum, we think that this provision of the law ought to be applied.

[1] The Compensation Law clearly gives the Industrial Accident Board the power, and makes it its duty, to award lump-sum compensation in cases where, in its judgment, hardship would otherwise result. Article 5246—44, Vernon's Sayles' Texas Civil Statutes 1918, provides for the bringing of suit to set aside the ruling and decision of the Accident Board, and that in such case the court shall determine the issues in such cause instead of the board, upon trial de novo. In other words, the findings of the Industrial Accident Board are not final nor conclusive, and a suit may be brought under the Compensation Act of 1917 to review the mater, and in that case the trial shall be de novo, and it becomes the duty of the court to hear the entire case and to pass upon all questions involved or presented. The bringing of the suit to set aside the judgment of the board seems to operate to have the effect of setting aside such judgment ipso facto, since it is apparently not necessary to allege grounds or reason for the setting aside of the judgment of the board. The effect of the law is to provide a method of having the matters passed upon by the court with judicial powers upon a trial entirely de novo. The appellant, not being satisfied with the judgment of the Industrial Accident Board, brought this suit in a district court of Harris county, and all matters were by the court reviewed upon a trial de novo, and the court determined the issues in such cause instead of the board. The Industrial Accident Board had no further power in the premises. It could perform no other functions in the matter after the bringing of the suit, and every question was subject to the examination and disposition of the district court, and the court had the same power to award the lump-sum compensation that the board formerly had. It was the judgment of the court that manifest hardship and injustice would result if a lump-sum award was not made, and judgment was entered accordingly. The Industrial Accident Board, under the provisions of the Compensation Law, is bound by no hard and fast requirement, and the district court is given the power to act in the same flexible manner. No abuse of discretion has been made to appear by the appellant, and it has not shown any resulting hardship or prejudice. The appellant was not satisfied with the findings of the Industrial Accident Board, which made a weekly award. It selected the forum for the review of the findings of the board. It is not satisfied with such review. It applies to this court for further consideration. The trial judge heard all

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of the facts, considered all of the circumstances and surrounding conditions, and exercised his judgment in the manner required by the Compensation Law and as his official duty required him to do.

[2] This court will not substitute its judgment and its discretion for that of the trial judge, who was in a better position to pass upon the question. We believe that the findings and conclusions of the trial judge, as to whether the compensation shall be paid in a lump sum, are final and conclusive, and not subject to be reviewed, on appeal, in the absence of any provision authorizing such review.

There have been no reasons presented for disturbing the findings of the trial court upon this issue, and the first assignment is therefore overruled.

The second assignment of error is as follows:

"The court erred in rendering judgment herein as aforesaid, and in distributing the amount of $2,297.85 (being said sum of $3,446.75 less $1,148.90) between the said Mrs. Regina Boudreaux and her two minor children, Idez and Louise Boudreaux, in the proportion of one-half to the said Mrs Regina Boudreaux and one-half to the said two minor children, Idez and Louise Boudreaux, together."

The proposition under this assignment is:

"The beneficiaries named in section 8a, part 1, of the act are entitled to share per capita in the distribution of the compensation provided in the act."

Section 8a, part 1, of the act, reads as follows:

"The compensation provided for in the foregoing section of this act shall be for the sole and exclusive benefit of the surviving husband who has not for good cause and for a period of three years prior thereto abandonded his wife at the time of the injury, the wife who has not at the time of the injury without good cause and for a period of three years prior thereto, abandoned her husband and the minor children, without regard to the question of dependency, dependent parents and dependent grand-parents and dependent stepmothers and dependent children or dependent brothers and sisters of the deceased employee, and the amount recovered thereunder shall not be liable for the debts of the deceased nor for the debts of beneficiaries as many as may be entitled to same as hereinbefore provided according to the laws of descent and distribution of this state; and provided such compensation shall not pass to the estate of the deceased to be administered upon, but shall be paid directly to said beneficiaries when the same are capable of taking, under the laws of the state, or to their guardian or next friend, in case of lunacy, infancy or other disqualifying cause of any beneficiary. And the compensation provided for in this act shall be paid weekly to the beneficiaries herein named and specified, subject to the other provisions of this act."

The trial court in construing the aforesaid section, ruled that Israel Boudreaux being a married man at the time of his death, the compensation due to his beneficiaries would be distributed in accordance with the statute of descent with regard to community property; that is, one-half to the surviving widow and the other one-half to the two children of the marriage.

It is conceded by the appellant that Mrs. Boudreaux was the surviving wife of Israel Boudreaux, deceased, and that her two minor daughters were the only children of the deceased entitled to participate in the compensation. And it is undisputed that Mrs. Boudreaux and her two daughters are the only persons entitled to share in the compensation arising on account of the death of Israel Boudreaux. The only question involved is as to the interest of the respective parties in the compensation.

[3] Appellant contends that the compensation should be shared by the benficiaries per capita. The appellees contend that one-half should

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go to the surviving wife, and the other half to the children, share and share alike. The trial court, in construing the statute in question, held that Israel Boudreaux being a married man at the time of his death, the compensation due to the beneficiaries should be distributed in accordance with the statute of descent and distribution with reference to community property, and we believe that this is a correct construction of the statute. In the first place, it will be noted that the Compensation Act provides that the compensation in case of death shall be distributed among such beneficiaries as may be entitled to the same according to the laws of descent and distribution. We have a law touching the descent and distribution of separate property, and we have a law touching the descent and distribution of community property. The Compensation Act provides for the distribution of compensation according to the laws of descent and distribution. This clearly indicates that the law of descent and distribution as to the community property shall apply where the rights of husband and wife are involved, and that in other cases the law of descent and distribution as to separate estate shall apply.

The Industrial Accident Board, having the administration of the Compensation Law in a comprehensive way, was required to construe the law as to who are beneficiaries in case of death; and it did so, and fixed a rule for its government on August 24, 1917, soon after the Compensation Act of 1917 went into effect. The board then had under consideration a matter in which the Honorable Harry P. Lawther, who is attorney for appellant in this case, was interested. Mr. Lawther urged his views upon this question before the Accident Board at that time, and contended then as now, that the compensation should be distributed per capita. The Accident Board did not share in this view, and expressed its conclusions in a letter written by its chairman to Mr. Lawther, dated August 24, 1917, and that letter was approved by the Industrial Accident Board as expressing its views upon the question, and it was adopted as a rule of construction touching the questions discussed, and it was ordered by the board that the same be recorded as a rule of action for the government of the board and those operating and acting under the Employers' Liability Act in this state, and 3,000 copies of the same were ordered to be printed by the board for distribution. This ruling of the Accident Board has been followed ever since it was adopted, and the rights of hundreds, perhaps thousands, have been disposed of accordingly. So far as we know, the question has not been presented to any court for determination. We believe that the courts of this state will agree with Industrial Accident Board. However, the courts may disagree with the board. The conclusion reached by the Accident Board seems to be consistent and correct throughout; the rights of many have already been determined by it. It should be the policy of the courts to adopt the views of the Accident Board, under all circumstances, if found to be fairly consistent with rules of construction.

The ruling of the Industrial Accident Board, as expressed in the letter to Mr. Lawther, is as follows:

"Austin, Texas, August 24, 1917.

"Honorable Harry P. Lawther, Dallas, Texas:

"My dear Mr. Lawther: I have read with more than passing interest your letter of July 25th addressed to Mr. D Edward Greer, and dealing with the primary question of the distribution of compensation, and the ancillary, and equally as important, question of lapsed compensation. Any question which challenges the consideration of you genetlemen becomes, if not theretofore, an important question And when you reach the iconoclastic conclusion, which you have in the present instance, those who differ with you, and who are charged with an administrative interest in the subject-matter, should explain that difference, and 'give a reason' to justify a contrary application of the important principles involved.

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"I shall not attempt to analyze the argument whch you make to reach your conclusion, but shall approach the subject from the original point of view. In doing this I realize I surrender certain advantages which always inhere in the analysis of an argument. But with me it is not a question of advantage—not with correctness of your premise nor the incorrectness of your conclusion. But rather a purpose to preserve the statute as written by the Legislature, and to administer it in the humane and just spirit in which it was enacted. ' The conclusions which you reach are:

"(a) That the language, 'The amount recovered shall be distributed among such beneficiaries as may be entitled thereto according to the laws of descent and distribution of this state,' are meaningless, and should be ignored in construing the statute—that they should be read out of the statute.

"(b) That the compensation should be apportioned per capita among all the beneficiaries named; that the act places all the beneficiaries in the same degree or class.

"(c) That when a cobeneficiary dies the compensation pro tanto lapses.

"The questions involved are:

"First. What is compensation?

"Second. How much, or the quantum thereof?

"Third. How distribute, or who is entitled to it?

"Each of these questions must be answered within the scope of the act; must be so construed and answered as to harmonize with the act in its entirety. In those places where the act is plain and unambiguous it will require no rule of construction to interpret its meaning which is gathered from the apt language expressing the purpose and intent of the act.

" 'It is an elementary proposition that the courts only determine by construction the scope and intent of a law when the law itself is ambiguous and doubtful. If a law is plain, and within the legislative power, it declares itself, and nothing is left for interpretation.' Lewis, Sutherland, art 267. A statute should be construed as an entirety. 'A statute is passed as a whole, and not in parts or sections, and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every part or section, and so as to produce a harmonious whole.' Lewis, Sutherland, art, 268.

" 'A statute must receive such reasonable construction as will if possible make all its parts harmonize with each other, and render them consistent with its scope and object.

" 'The general intent should be kept in view in determining the scope and meaning of any part.' Id.

"The employers' Liability Act undertakes, where an employee is injured in the course of his employment, to compensate him—not entirely, but partially—for the injury sustained. In such case there is no reason for construction, for the statute states that he himself shall be entitled to compensation, and that compensation shall begin to accrue with the eighth day after the date incapacity commenced.' Now, that which is paid to the injured employee is 'compensation' The question then arises, 'What is compensation?' The word 'compensation' means: 'That which is given or received as an equivalent, as for services, debt, want, loss or suffering; indemnity, recompense, amends; requittal. That which supplies the place of something else, or makes good a deficiency or makes amend.' Century Dictionary. Under the Employers' Liability Act, compensation is given and received 'as an equivalent' for wages. It is recompense for lost earning capacity, and supplies the place of destroyed ability to produce. If there was no earning capacity, there can be no compensation. The power to earn wages, and the actual earning of wages are conditions precedent to the lawful claiming or payment of compensation. The theory of compensation is that the injured employee was of value to society as a

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producer—was worth something to others who were dependent upon his earnings for support. This law makes no note of the 'slacker.' but deals only with those who are workers in the industrial world, and produce the wealth of the world and who in doing so earn wages. Not only is this true, but the amount of the compensation bears mathematical relation to the amount of wages so earned. If he earns much he is compensated accordingly, while if he earns little he is compensated but little. This law, like nature, rewards the dilligent, measured always by producing (earning) capacity, while the sluggard, or he who produces but little, receives at its hands only that small but just part to which he is entitled by virture of his lost power of production. The ratio between wages and compensation is unvarying—is fixed by statute. It is sixty per cent. of his average weekly wages before he was injured.

"We are dealing now with total incapacity for the purpose of carrying the principle into application in death cases. Under section 10, part 1, of the act, an employee who is injured in the course of his employment is entitled to sixty per cent. of his average weekly wages as compensation for a definite period.

"The law fixes the percentage. The employee expects it before, and claims it after, injury. The employer buys that percentage when he pays for the policy, and the association agrees to pay that percentage in case the contingent obligation matures and the policy has to be paid. You certainly would not argue that this amount of compensation could be reduced as long as the incapacity was total and permanent.

"Turning now to section 8, part 1, of the act, which is the section which provides: 'If death should result from the injury, the association hereinafter created shall pay the legal beneficiaries a weekly payment equal to sixty per cent. of his average weekly wages,' etc. The requirments as to payment under this section are identical with those under section 10, relating to total incapacity, except the payee is different.

"The beneficiaries to whom compensation is payable under section 8 are designated under section 8a, and the rule of method of determining which of said legal beneficiaries shall take, and the order in which they shall take, is set out and prescribed in said section 8a by the direction: 'And the amount recovered thereunder shall be distributed among such beneficiaries according to the law of descent and distribution of this state.' This section groups the beneficiaries who may take compensation,and limits the payment to persons within the group. A person not within the group named cannot claim compensation, however dependent he may have been upon deceased in his lifetime. And one not dependent in fact, or conclusively presumed by the law to be dependent, cannot take compensation, however close his kinship may be. It is not a rule of heirship under the laws of descent and distribution, but the laws of descent and distribution are simply called into play for the purpose of locating the proper parties within the given group who can take the compensation provided by law. The law presumes the deceased employee would want the compensation to pass to the dependent or dependents nearest and dearest to him in life. These, those nearest and dearest, are clearly ascertainable under our statutes of descent and distribution, which have been designed for the disposition of the property of those who die without leaving wills. Everybody named in section 8a without regard to dependency, except the stepmother, can take property by inheritance from a deceased employee under these statutes, and the order in which they take is fixed by the statutes. The compensation, or the right to it is not a vested right, to be transmitted by will or inheritance, is perfectly clear under the act itself, and your argument to sustain that proposition was unnecessary. Every person named in section 8a except the stepmother is an heir, and can take by inheritance under the statute. But the Employers' Liability Act narrows the list of those who can take compensation to the persons named in section 8a and none others. It

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follows then, of course, that if there are none such to take that the compensation will lapse for the want of a beneficiary. But so long as there exists a beneficiary within the compensation period, the association must pay 60 per cent. of the wages of the deceased, for it is so written in the law.

"The Legislature, in the language used and heretofore quoted with the limitations suggested, as clearly wrote the laws of descent and distribution into this act as if they had copied them verbatim. They did so to afford a fixed and construed rule for the distribution of the compensation, which is as simple and as capable of quick application as any other rule of law. They did it also because it was a just and humane rule of the law, long established and confidently believed in by the people who live under it. Our laws of descent and distribution are not arbitrary, nor are they of sudden or of sporadic growth. But they were long thought over, carefully considered, applied, and approved by the Texas people Such law or laws on that subject have been the source of much legislation and more litigation through all the ages of ours, and the jurisprudence of other people, until now we have fixed upon our present laws of descent and distribution as the proper way to pass and distribute the property of him who dies without will. In doing this the law does for him that which he failed to do in his lifetime. And in doing so it tried to give the property to those who had nature's first claim upon the deceased, and to whom in the light of all experience, the law believes he would have given it had he made a will. In doing this the law took up the lines of the human heart, and ran them to their end, and the objects first reached from heart, dead, it presumes were closest when the heart was warm and loved the world and these the law declares to be the heirs who should take the property of him who died intestate, because all nature told the law that had the deceased made a will that these would have been his beneficiaries. And so our law writes every day in this state of ours the wills of the many, many men and women who die intestate. Those who so die know the law—approve its just, natural, and humane distribution, and, so approving, die, leaving their property and those whom they love to the laws of descent and distribution of this state.' So where could the law have found a better rule of action, a more approved method of distribution, among the named and favored group designated in section 8a, than is afforded by the laws of descent and distribution of this state.' Yet you would read this provision out of this statute, and justify your act on the uncetain ground of uncertainty.' Where is there any uncertainty in the application of this rule—this method—in the distribution of compensation?

"If the relation of the parties, the beneficiaries, is such to the compensation that, if it had been reduced to possssion in his lifetime, it would have been community property then, in case the injured employee should die, the compensation would be payable to his beneficiaries under the rule of method prescibed by the laws of descent as applicable to community property. On the other hand, if the relation of all the parties to the compensation was such that, had it been reduced to possession during the life of the employee, it could have been separate property, then the laws of descent and distribution as the same govern separate property, would furnish the rule or method for its apportionment. This is made conclusive by application of the rule in either case. If the husband is totally and permanently injured, the wife is entitled to one-half the compensation payable to him, because it is given in lieu of wages—given to compensate for the loss of earning capacity. Wages is community under our law, and the wife is entitled to one-half the husband earns. The wife is entitled to one-half the earning capacity of the husband, and if that earning capacity is destroyed by an industry, and she is not entitled to one-half the compensation paid therefor, then, as to her, there is no law, for she has not been compensated. If he dies as a result

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of the injury so sustained, her loss was one-half of his earning capacity—one-half of the wages he would have earned—and to be compensated for the loss she has suffered is entitled to one-half of the compensation to be paid. Under the community statute, there being children, she would get one-half, while under the other statute she would get only a one-third. She lost a half, and the law compensates for the loss so sustained, and gives her one-half of the compensation. If there are no children, she gets it all, because under that statute, applied only as a rule, she would take all. Why should she not have it? Hers was the shortest line reaching out from the dead heart which the world's industry had destroyed. If they had children, all dependent, she would take half and they would take half. The compensation payable at the death of the employee and to the children would be divided among the children because they were all of equal standing, and the equal right of each was an intervening barrier against the other taking more than his portion of the compensation. If one died or ceased to be a beneficiary, his part of the compensation would not lapse because the status of the others was fixed at the death of the employee; they were then, and continued to be, legal beneficiaries within the terms of the law, and the compensation which went to their cobeneficiaries did so because he had a right to share in that compensation, and when he ceased to share it was because this right so to do failed (lapsed, if you please), and not because of any right accruing to the association. The remaining beneficiaries were prevented in the beginning from taking all the compensation because of the intervening equal right of their cobeneficiary and when that right ceased they were entitled to it all, not as heirs of a deceased beneficiary, but as the legal beneficiaries of the deceased employee. It is not a question of heirship, but the question is, is there in existence a legal beneficiary of the deceased employee capable of taking the compensation, and if there is, he is entitled to it. A reference in section 8 ought to conclude this argument, for it says the association shall pay the legal beneficiaries 60 per cent of the average weekly wages of the deceased. It is immaterial whether there is one or forty beneficiaries, the obligation of the company is the same, to wit:

"To pay sixty per cent.—no more, no less In addition to this the employer bought that much, the employee expects that much, and the insurance company contracts to pay that much. So you see that under the laws of descent and distribution the one relating to the distribution of community property is of easy and simple application, furnishing a rule for the apportionment of compensation to the legal beneficiaries of a deceased employee. But let us apply this community statute to a reasonably complex case, and see how it works. Of course, the existence of the marital relation is a condition precedent always to the application of this statute for any purpose. Take this case: An employee is injured and lives three months and one week totally incapacitated. Then, as a result of such injury, he dies, leaving a wife, a boy two years old, and a girl baby, all three of whom are conclusively presumed under the law to be dependent on him. In addition he leaves an idiotic brother, a father, blind and 70 years of age and penniless, and a paralytic stepmother 60 years old and incapable of doing work, and all three, as matter of fact, are wholly destitute and dependent upon him for support. The compensation is $15 a week. All the parties are beneficiaries within the defined group made by section 8a, and the question arises to whom shall the money be paid? The same section says, under the laws of descent and distribution. We ask which one? And then we see that the marital relation existed—and the wife's interest was involved, and that the compensation is given in lieu of wages—we at once turn to the laws of descent and distribution and invoke the statute governing community as the rule by which to go. Applying this rule, we give the wife one-half the compensation and the boy and girl baby one-fourth each.

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The rights of the children are equal, and they share equally. Each Would share one-half with the mother were it not for the intervening equal right of the other. The father, brother and stepmother are beneficiaries; in being capable of taking not as heirs but as beneficiaries but they are prevented from doing so by virtue of the prior and higher rights of the wife and children, so fixed by the laws of descent and distribution which is made a part of the Compensation Act for the purpose and reasons stated. The boy dies at the end of the month. The liability of the association is in no sense changed—it still must pay sixty per cent. to the legal beneficiaries. The girl would then take the one fourth formerly paid to her brother, not as his heir but as unobstructed beneficiary of her dead father . The intervening cause which prevented her taking at first—the equal right of her brother —has been removed—his right thereto has failed—and hers, which has been thus suspended or held in abeyance by his equal right as to that part, asserts itself, and she is entitled to that which had theretofore gone to him. Then the first baby, at the end of another month, dies, and the compensation immediately passes to the mother under this statute, which gives her all the community where there are no children, for the same reasons apply. At the end of another month she dies, and the compensation passes to his father and brother, one-half each, not as heirs—not by inheritance—but as surviving beneficiaries of their deceased brother and son. They were legal beneficiaries at the time of his death, capable of taking under the law, but their respective rights were suspended by the limitations made that the compensation should be distributed under the laws of descent and distribution which gave to the wife and children a prior and higher right to the compensation which operated to hold in abeyance their right. If the Compensation Act made all their rights equal, as you suggest, it at once differentiated these rights by declaring that they should be determined under the laws of descent and distribution of this state. Why should the Legislature devise a new plan for the apportionment of compensation which is based on the cleanest and highest property—wages. Wages suggest labor—toil; and they are always an ingredient in the fulfillment of the divine injunction that man shall eat his bread in the sweat of his face. Why have a new rule for the distribution of compensation whose forerunner was earning capacity and sine qua non to whose existence was wages. You admit the Legislature did not write a new rule, and then you evolve the one you would apply for the lack of certainity, which I cannot admit.

"But, returning to our example, at the end of another month the brother dies, and the unearned compensation, or the right to it, as it is reduced to possession, passes to the father, who is the only remaining beneficiary under the laws of descent and distribution who can take. It comes to him because the superior rights of his daughter-in-law and the children and the equal right of his son have failed. He is the sole beneficiary under the laws of descent and distribution. There may be other brothers and sisters and other kin, but they cannot take, because they are not dependents. So you see, in this respect, the Compensation Act limits and restricts the laws of descent and distribution to the group named. A person can be an heir and at the same time not a beneficiary, because of the restrictions and limitations pointed out. But he cannot be a beneficiary (with the exception of the stepmother, which I will point out later) without being an heir. The provision in the act making the stepmother a beneficiary was an enlargement on the statutes of descent and distribution, and we cannot look to them for authority to pay compensation to her, but must look to the Compensation Act itself. Now the father dies, and we turn to the laws of descent and distribution, and they are silent as to the rights of the stepmother; but the Compensation Act says the compensation shall be

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for the sole and exclusive benefit of a certain group, and she is in the group, and therefore entitled to be paid the unearned compensation as it accrues. She lives a month, and then she dies, and the compensation ceases because there is no legal beneficiary to receive same.

"It occurs to me that is so plain that a wayfaring man ought not have any trouble with it, much less two of the best lawyers in two ends of a big state.

"Now, try out a 'claim' under the separate property descent and distribution act. You start with a single man, and, there being no marital rights involved, the community statue is not applicable, and you ascertain the beneficiaries under the other statute 'just like tracking a rabbit in the snow,' and reach the last beneficiary in this case like you did in the other, and when all are gone there will be no one to take the compensation, and the association will be relieved of its obligation to pay. The conclusion I reach then is:

"That so long as there exists a beneficiary capable to take the compensation there can be no such thing as either a lapse or partial lapse of compensation. The association in such case must pay, and pay what the statute says pay—60 per cent. of the average weekly wages of the deceased employee. The Murphy Case which you cite sustains this view. The court, in the concluding part of the opinion, says—obiter, it is true—that while the compensation in that state is made payable to the mother, and it is not a vested right capable of being transmitted by inheritance, yet if if she should die leaving minor children the compensation would not lapse, but would survive for them as beneficiaries of the deceased father. Thus the Massachusetts court reads into their statute that which our Legislature wrote into ours. The Matocney Case is in no sense in point, for it is based on the agreed fact that the mother was sole beneficiary and was an invalid. The court held that compensation was not a vested right, capable of being transmitted by inheritance, and that if a sole benefiiary died compensation would lapse. Our statute fixes this both in its language and construction, and for this purpose citation was unnecessary. The court held that on the agreed facts it was not a case in which to coerce a lump sum settlement.

"The construction which you place upon this section of this statute is so far-reaching in its effect, is of such vital importance to the employees of this state, that I will appreciate it very much if you will advise me if it is submitted to any court for construction at any time, as I will ask for permission to file a brief with the court supporting the views I have here advanced."

"The above foregoing letter, dated August 24, 1917, and addressed to Honorable Harry P. Lawther, Dallas, Texas, has been read and approved by the board, the same is hereby adopted as a rule of construction touching the questions therein discussed; and it is ordered by the board that the same be put on record in the Miscellaneous Order Book of this department as a rule of action for the board and those operating and acting under the Employer's Liability Act in Texas.

"It is also ordered by the board that three thousand copies of said order, when so entered. shall be printed for distribution among employers and employees and associations covered by this act.

"Done at Austin, Texas, this 24th day of August, 1917.

"T. H. McGregor, Chairman of Board.

"J. H. Fricke, Member of Board.

"J. H. Fowler, Member of Board."

It will be observed that the appellant does not complain of the amount of the lump sum awarded, $3,446.75, as determined by the trial court, and no complaint is made as to allowing attorneys one-third of this amount. This lump sum was awarded according to the rule of discounts adopted by the State of New Jersey as a rule of computation in

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compensation cases which rule has been adopted by the Industrial Accident Board of this state.

As we have formerly said, no case has been construed by the courts of this state with reference to this matter, and therefore we are left to be guided only by what is just and fair to all parties concerned. We have given this matter our most earnest and thoughtful consideration, and we are of opinion that this assignment must also be overruled.

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SUPREME COURT OF WISCONSIN.

SCHROEDER & DALY CO. ET AL.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —INJURY "INCIDENTAL TO EMPLOYMENT."

Where a salseman, required by his duties to go from place to place in the city, slipped and injured his leg while on the street he must be considered to have been performing services "incidental to his employment," within Workmen's Compensation Law (St. 1917, § 2394—3), and the accident cannot be considered the result of an ordinary street risk.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge

Application by Paul Toll for compensation under the Workmen's Compensation Law against the Schroeder & Daly Company, the employer, and the Employers' Mutual Liability Insurance Company, the insurer. An award of the Industrial Commission was affirmed by the circuit court, and the employer and insurer appeal. Affirmed.

The applicant, Paul Toll, a salesman in the employ of the Schroeder & Daly Company, was required by his duties to go from place to place in the city of Milwaukee selling produce to grocerymen. On January 31, 1918, while so engaged, and while traveling from one place to another, and while on the public street, he slipped and injured his right leg. Upon application to the Industrial Commission he was awarded compensation. This action was brought in the circuit court for Dane county to review the award made by the Industrial Commission. The circuit court affirmed the award, and from such judgment of affirmance the plaintiffs appeal, the Employers' Mutual Liability Insurance Company being the insurer of the employer.

Brown, Pradt & Genrich, of Wassau, for appellants.

John J. Blaine, Atty. Gen. and Winfield W. Gilman, Asst. Atty. Gen., for respondents.

ROSENBERRY, J. (after stating the facts as above). The only question presented here is whether or not Toll at the time of the injury was performing services growing out of and incidental to his employment. Subdivision 2, § 2394-3, Stats. It is the contention of plaintiffs that the injury sustained by the applicant is one which did not grow out of his employment but was the result of an ordinary street risk. This contention is based upon the proposition laid down in the McNicol Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, that the causative danger must be peculiar to the work and not common to the neighbor-

*Decision rendered, June 25, 1919. 173 N. W. Rep. 328.

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hood, and upon Hoenig v. Industrial Commission, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, where it was held that an injury caused by lightning stroke while the applicant was working on a dam, and not exposed by reason of his employment to a hazard peculiar to the industry, or differing from a hazard to which all outdoor workers are exposed, was not one arising out of or incidental to his employment.

The use of the word "peculiar" in this connection is perhaps unfortunate, and not exactly accurate. A hazard peculiar to an industry, as that word is most frequently used is a hazard which belongs exclusively to that industry. That the word, however, is not used with that meaning in the cases referred to, is plain upon a moment's reflection. It is used rather in the sense of risk which appertains to the particular industry, or, in other words, a risk which is inseparably connected with it, and so incidental to it. While it is said in the Hoenig Case that the matter turns upon the nature of the hazard, when the statement is taken in connection with the context, it will be seen that the pivotal question is as stated in Ellingson Lumber Co. v. Industrial Commission, 169 N. W. 568; Is the injury one resulting from a hazard that necessarily pertains to the industry or is substantially increased by reason of the nature of the services which applicant is required to perform? Substituting for the word "peculiar" a phrase embodying the meaning with which that word is used, the question may be restated thus: Is the inquiry one resulting from a hazard pertaining to and inseparably connected with the industry, or substantially increased by reason of the nature of the services which the applicant is required to perform? It is not the nature of the hazard that is the determinative thing, but rather whether or not it is a usual or necessary incident to the employment. Here the applicant, while in the discharge of his duties under his employer's direction, was required from time to time to cross public streets. While the hazard to which he was exposed is not peculiar to the employment, in the sense that it appertains to it exclusively, and it is not common to other occupations, it is nevertheless a hazard inseparably connected with the employment, and therefore incidental to it. An employee who is required in the usual course of his employment to cross and recross streets almost constantly is certainly much more likely to suffer injury from street hazards than one not so circumstanced. The hazard to which the applicant in this case was exposed was not only inseparably connected with his employment, and incidental to it, but the hazard was substantially increased by reason of the nature of the services which he was required to perform.

If it should be held that messengers, deliverymen, salesmen, and others, who by the nature of their employment are required to be continually on the streets and highways, are not entitled to compensation for injuries received in the course of their employment, if the injury occur on a street or highway, a large class of worthy applicants would be cut off and the Workmen's Compensation Law emasculated. If an employee in the course of his employment is required to go up and down a stairway occasionally or frequently, and while so doing falls and injures himself, should he be denied compensation because every one uses stairways and is continually liable to receive like injuries? Clearly not The risk of injury to the applicant in this case was incidental to his use of the street in the course of his employment, and was peculiar to the employment, in that the work of the employee could

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not be carried on without his subjecting himself to that risk. It therefore grew out of his employment. The fact that others may be exposed to like risks does not change the character of the risk to which the applicant was exposed. Globe Indemnity Co. v. Industrial Commisssion (Cal. App.) 171 Pac. 1088; In he Harraden (Ind. App.) 118 N. E. 142; Industrial Commission v. Ætna Life Ins. Co. (Colo) 174 Pac. 589; Foley v. Home Rubber Co., 89 N. J. Law, 474, 99 Atl. 624; Kunze v. Detroit Shade Tree Co., 192 Mich 435, 158 N. W. 851, L. R. A. 1917A, 252; Dennis v. A. J. White & Co., 86 L. J. K. B. 1074

Judgment affirmed.

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UNITED STATES CIRCUIT COURT OF APPEALS.

SIXTH CIRCUIT.

ZAJKOWSKI

v.

AMERICAN STEEL & WIRE CO. (No. 3195)*

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—OCCUPATIONAL DISEASE.

In view of Const. Ohio, art 2, as amended September 3, 1912, and in view of Page & A. Gen. Code Supp. Ohio, § 6330—1, the Workmen's Compensation Act of the state (103 Ohio Laws, p 72, approved March 14, 1913) has no application to the case of an operator of sheet steel finishing rolls, blinded and invalided by the strong glare of powerful lights from the glittering surfaces he had to inspect, an occupational disease.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Mike Zajkowski against the American Steel & Wire Company. To review a judgment for defendant, plaintiff brings error. Judgment reversed, and case remanded for further proceedings not inconsistent with the opinion.

We understand the theory of this action to be that it is one to recover damages arising under conditions calculated to cause and causing an occupational disease. The case was disposed of below upon the pleadings and the opening statements of counsel. The petition, a very long one, in substance states: The plaintiff, as an employee of defendant, was for two years occupied in the operation of certain power-driven finishing rolls which with certain dies were used for pressing sheets of steel and forming them into desired sizes, and in seeing that the sheets of steel as they came from the rolls were of perfect texture and precise dimensions, and, at the same time, measuring the steel in a minute and particular way through the use of delicate measuring instruments. This was done under electric lights of high power and in substantial part maintained about 18 inches above the plane of the steel sheets. The surfaces of the sheets were "almost as bright as a mirror," and the surfaces of the rolls were bright; the sheets were long and as they came from the rolls they were continuously "waiving, shaking, and wobbling," so that there was at all times an intense glare of light, and at times flashes of light cast into plaintiff's eyes. Plaintiff was obliged to strain his eyes to the utmost in order to discover the condition of the sheets with respect to texture and dimensions, irregularities, and scratches. Defendant's foreman found it necessary to use a magnifying glass to inspect plaintiff's work. To produce steel sheets of the quality indicated, they were put through various processes, such as dipping into chemicals and applying oils, grease, and water, before reaching the rolls, and thus plaintiff's eyes, hands, and system became saturated with these substances, so that his health and the sight of both eyes were ultimately destroyed. Meanwhile he notified defendant that his eyesight was becoming "blurred and foggy," and that he could not read the gauging instrument as freely as before. This brought about an examination on the part of defendant's physician; but plaintiff was sent

*Decision rendered, December 5, 1918. 258 Fed. Rep. 9

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back to his work, and he remained until March, 1916, when he notified defendant that he could not see to do the work; he was thereupon led by defendant's foreman from the premises and "told to go home." In the course of his work he was not provided with goggles or other devices to prevent the splashing of liquids into his eyes or to diminish the strain upon them. Defendant gave him no notice or warning of the dangers of injury to his eyesight or health, nor instructions in that behalf, and he was ignorant of these dangers. He had been in defendant's employ some four years when he was ordered to enter upon the work above described; at the time of entering upon the new work he was possessed of perfect eyesight and health. The disease so contracted was aggravated through the overheated condition of the place in which plaintiff was required to work, and also through extra exertions caused by defects in the machinery and lack of necessary assistance; and plaintiff frequently complained to defendant concerning the defective condition of the machinery, and repeated promises were made to remedy the defects, though these promises were not kept. Damages are claimed in the sum of $50,000.

The answer admits defendant's operation of the plant for the alleged purpose of manufacturing wire and other products, that plaintiff was in its employ as a laborer, denies the other allegations of the petition, and as a further defense avers that it had complied with the Workmen's Compensation Act of Ohio, and that by reason thereof plaintiff is not entitled to maintain the action. It was in effect admitted in the statements of opposing counsel that defendant had complied with the requirements of the Compensation Act.

At the close of the opening statements of counsel and on motion of defendant a verdict was directed in its favor, and judgment entered accordingly, upon which plaintiff below founds the writ of error.

Louis H. Winch, of Cleveland, Ohio, for plaintiff in error.
Wm. L. Day, of Cleveland, Ohio, for defendant in error.

Before Warrington and Knappen, Circuit Judges, and McCall, District Judge.

WARRINGTON, C. J. (after stating the facts as above). [1] In the view of the learned trial judge, the Workmen's Compensation Act (102 Ohio Laws, p. 524) gave to defendant immunity from any right of action that might otherwise have accrued to plaintiff under the facts alleged in his petition. Laying that act to one side for the present, we think the petition states facts constituting a cause of action for damages due to an occupational disease which was incident to the work plaintiff was performing. Diseases of occupation have been the subjects of much concern and investigation both abroad and in our own country. Such diseases, of course, signify causes and conditions, whether natural or artificial, which attend the performance of work and injuriously affect the persons exposed. They have been variuosly defined, such as, for instance, "the poor health which results from working under improper conditions"; again, "disease due to the employment"; and Dr. Thompson, in his recent work on Occupational Diseases, says that such diseases—"may be defined as maladies due to specific poisons, mechanical irritants, physical and mental strain, or faulty environment, resulting from specific conditions of labor. * * * They arise from a great variety of poisons, irritating substances, and exposure to unusual physical conditions."

The occupation described in the petition extended over a period of more than two years, and the disease complained of developed and progressed by gradual process until it culminated at last in the loss of plaintiff's eyesight and health alike. Plaintiff's trouble was not due to causes outside of the environment of his work, nor was it one of accident or of

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traumatism in the sense of violence; it was due to causes incident to his service whose effects upon his eyesight and health are alleged to have been unknown to him though within knowledge reasonably imputable to defendant. The instant case is broadly distinguishable from that of Industrial Commission v. Roth, 120 N. E. 172, 16 Ohio Law Rep. 251, 252, 254, to be reported in 98 Ohio St. ——, where Roth, though not a painter, was directed temporarily to do some painting, and died from inhaling poisonous fumes and vapors arising from a bucket of hot paint; and his death was held to be the result of an "accidental and unforeseen inhaling" of a specific, volatile poison or gas," and not the result of an "occupational disease"; indeed it was said by Judge Donohue in the course of the opinion:

"In this case it is admitted that the deceased was a common laborer, and that the disease of lead poisoning is not incident to his regular occupation, but, on the contrary, is incident to the work in which he was employed for the two days preceding his illness."

[2] The case set out in the petition falls well within principles of the common law. The general rule is that where an employer places and continues an employee for a substantial length of time in the regular performance of work and under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employee a disorder of serious and injurious character regardless of the name by which the disease is known it is the duty of the employer to warn and instruct the employee as to the dangers and to furnish him with reasonably effective means to avoid them and where as the direct result of failure to perform this duty an employee in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover. Wiseman v. Carter White Lead Co., 100 Neb. 584, 587, 589, 160 N. W. 985; Thompson v. United Laboratories Co., 221 Mass. 276, 280, 108 N. E. 1042; Fox v. Peninsular etc., Works, 84 Mich. 676, 682, 48 N. W. 203; Wagner v. Jayne Chemical Co., 147 Pa. 475, 479, 23 Atl. 772, 30 Am. St. Rep. 745; Meany v. Standard Oil Co. (N. J. Sup.) 55 Atl. 653; Pigeon v. Fuller, 156 Cal. 691, 698, 701, 105 Pac. 976.

[3, 4] Furthermore, recognition of the right of recovery upon facts such as are stated in the instant case is found in both constitutional and statutory provisions of Ohio. By amendment of September 3, 1912, to article 2 of the Ohio Consitution (Page's Annotated Constitution [Ed. 1913] pp. 171 to 217, § 35), provision was made looking to the compensation of "workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment," through laws to be passed by the General Assembly; section 35 providing however that—

"No right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees."

On May 6, 1913, the General Assembly of Ohio passed a statute entitled "An act for the prevention of occupational diseases with special reference to lead poisoning." 103 Ohio Laws, 819 to 824. Section 1 of the act (section 6330—1, Page & A. Gen. Code Supp. Ohio) provides:

"Every employer shall, without cost to the employees, provide reasonably effective devices, means and methods to prevent the contraction by his employees of illness or disease incident to the work or process in which such employees are engaged."

In distinct sections of the same act the manufacture of certain named products of lead is declared to be "especially dangerous," and employers engaged in the manufacture of these products are required to furnish devices and means of specific kinds to avoid the dangers of lead poisoning. Section 9 imposes penalties upon employers for violation

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of certain sections of the act, including section 1, which are applicable to the particular business in which the offending employer is engaged. Argument is not necessary to show that the purpose of this legislation was to impose upon employer duties designed for the protection of their employees. The effect of the first section, 6330—1, is to charge the employer with the duty to protect employees from the contraction of disease which is incident to the work they are required to perform. The intent plainly is to require the employer, where necessary, to ascertain what "devices, means and methods" are "reasonably effective" to prevent contraction of an occupational disease; and certainly in most instances the employer rather than the lawmaker is qualified rightly to understand what measures are necessary. The class of business occupations thus dealt with manifestly differs from the class of manufactures contemplated by the sections relating to lead products; since the first class would seem to concern work and processes involving dangers not so well known as those attending the manufacture of lead products.

The purpose to impose duties upon employers embraced in the first class as well as the second is accentuated by the imposition of penalties upon both classes alike; and while there might be greater difficulty in proving an offense under the first class than under the second, the duty is none the less positive in character in the one than in the other. These features derive emphasis in the instant case from the allegations that defendant provided no measures whatever for the protection of plaintiff's eyesight and health. It hardly is necessary to add that the legal consequence of violating section 6330—1 is not limited to the penalty prescribed in section 9 of the act; for the rule is that where a statute, although penal in character, plainly imposes a duty for the benefit of a class of individuals a right of action accrues to a person of that class who is injured through breach of the duty. Variety Iron Co. v. Poak, 89 Ohio St. 297, 303, 307, 106 N. E. 24; N. Y., C. & St. L. R. R. Co. v. Lambright, 5 Ohio Cir. Ct. R. 433, 434; Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 300, 37 C. C. A. A. 499, 48 L. R. A. 68 (C. C. A. 6); 2 Cooley on Torts (3d Ed.) pp. 1400, 1408, and citations.

[5] We thus come to the ruling below. In considering the petition the District Judge said:

"If it does not state a cause of action under the Workmen's Compensation Law and within the exception of the Workmen's Compensation Law, it does not seem to me that the petition states any kind of cause of action."

We are, however, convinced that this act has no bearing upon the instant case. The act, as the name usually given to it indicates, provides for the collection of a state insurance fund and its disbursement among employees. According to the title of the act, the fund is designed "for the benefit of injured, and the dependents of killed employees" (103 Ohio Laws, 72, approved March 14, 1913). Section 13 defines employers to whom the act is applicable. Section 22 provides for employers' payments of premiums. Section 23 is in part as follows:

"Employers who comply with the provisions of the last precedings section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employee, wherever occurring, during the period covered by such premium so paid into the state insurance fund. * * * "

The saving clause so referred to is found in section 29, which in substance provides that "where a personal injury is suffered by any employee or where death results to an employee from personal injury * * * while in the course of employment," an employer who has paid his premiums shall not be liable unless such injury or death shall have arisen from the "willful act" of the employer or from the employer's failure to comply with any "lawful requirment for the protection of the

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lives and safety of employees," but in either of the latter events "nothing in this act contained shall affect the civil liability of such employer."

It is to be observed that the act is limited to compensation for "injury" or death" of employes; it makes no provision in that behalf for disease. We have seen that the Constitution permits the passage of laws providing compensation for employes or their dependents in cases of "death, injuries or occupational disease." Industrial Commission v. Brown, 92 Ohio St. 309, 110 N. E. 744, presented the question whether Brown, an employee who had contracted lead poisoning in the course of his employment, was entitled to participate in the fund designed for the compensation of employes under the original Workmen's Compensation Act of May 31, 1911 (102 Ohio Laws, 524), which, of course, was before adoption of the constitutional amendment. Brown applied to the proper official board for compensation and his claim was disallowed; he appealed to the Hamilton common pleas, where he recovered judgment, which necessarily entitled him to be paid out of the insurance fund (section 36, Id. p. 531), and this action was affirmed by the Court of Appeals of the same county, though reversed by the Ohio Supreme Court. The Compensation Act then under consideration, like the present one, provided only for "injuries or death." Section 20—1, 21—2, Id. 528, 529. In the course of the opinion Chief Justice Nichols said (92 Ohio St. 314, 110 N. E. 746):

'It is to be observed that the constitutional amendment differentiates between injuries and occupational disease. It clearly recogizes three distinct classes for which provision may be made: (1) Injuries resulting in death; (2) nonfatal injuries; and (3) occupational diseases—and all are to be limited to such as might be occasioned in due course of employment. The present law specifically provides for compensation for two of these classes only and significantly omits any provision for compensation for the third class. Were this claim one that had accrued under the new law, the court could only construe the passage in dispute, in the light of the Constitution, as wholly excluding any compensation for injury by disease, whether occupational or otherwise. The Legislature would have been within its constitutional rights had it included the third class, and its failure to do so, under the circumstances, makes of it a case of designed omission."

This ruling was approved in Industrial Commission v. Roth, supra, 16 Ohio Law Rep. 253. The case of Roth, like that of Brown, grew out of an application to the proper board for compensation to be paid out of the insurance fund. The claim was disallowed by the board on the theory that Roth had died of an occupational disease, and this denial was in effect affirmed on appeal to the Jefferson common pleas, but was reversed in the court of appeals of that county, and the reversal was affirmed in the Supreme Court on the ground, as we have already pointed out, that Roth had met his death through an "accidental and unforeseen inhaling" of a "specific volatile poison or gas" and not from an "occupational disease;" but the implication is clear that if the death had resulted from that disease the right to participate in the insurance fund would have been denied; indeed it is declared both in the first paragraph of the syllabus and in the opinion (16 Ohio Law Rep. 251, 254) that an occupational disease is "not within the contemplation of the Workmen's Compensation Law." The impelling feature of these decisions, when considered together, is that Brown's claim failed because he was affected by an occupational disease, while Roth's succeeded because his death was not the result of occupational disease, but of an accident.

It results, in view of the controlling authority of these decisions, that the Compensation Act is inapplicable, and, it need not be said, that the exemption from liability given by section 23 of the Compen-

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sation Act to employers who comply with the provisions of section 22, and the exceptions contained in section 29 in relation to employers who are open to the charge of willful acts or failure to perform any lawful requirement within the meaning of that section, are not of present importance. It cannot be that the Compensation Act was designed to take away any right of action as respects a claim, like the one here involved, which the act does not purport to include or to allow to be paid out of the insurance fund. Any view to the contrary must ascribe to the General Assembly at once a purpose to frustrate the power vested by the Constitution in respect of occupational disease and a lack of purpose through section 6330—1 to grant relief of any character to employees contracting such disease. That statute was passed after the Compensation Act, and, as already shown, was intended to create and preserve rights of action where the duty it imposes is violated. For similar reasons the case of Woodenware Co. v. Schorling, 96 Ohio St. 305, 117 N. E. 366, Ann. Cas. 1918D, 318, relied on by the company, is not on its facts relevant. Schorling sustained injuries through the fall of lumber from a car, which clearly brought his case within the Compensation Act; and although his employer had complied with the act Schorling sought recovery by an ordinary action at law. Among the grounds urged was that under section 35, art. 2, of the Constitution, and section 29 of the Compensation Act, sections 15 and 16 of the Industrial Commission Act constitute "lawful requirements" for the violation of which the action could be maintained; but it was in effect that those sections are not self-executing and must be supplemented by special orders of the Industrial Board Id. 96 Ohio St. 320, 321, 117 N. E. 366, Ann. Cas. 1918D, 318. Thus the decision in that case, like the scope of the statutes it construed, does not reach the question involved in the instant case. In fact, Judge Johnson said (at page 317 of 96 Ohio St., at page 370 of 117 N. E. [Ann. Cas. 1918D, 318]):

"There is nothing in the Industrial Commission Act which indicates an intention of the Legislature to enlarge or diminish the rights of employees and employers under the Compensation Act, which had then recently been passed."

The Industrial Commission Act was approved March 18, 1913 (103 Ohio Laws, 95, 110), while, as we have said before, section 6330—1 was approved the following May 6th (Id. 819, 824), and no reference was made in the last statute either to the Compensation Act or the Industrial Commission Act. Section 6330—1 stands alone as the latest expression of the legislative will; it is in terms both complete and imperative; it should be given effect.

When it is remembered that plaintiff' action is based upon alleged negligence of defendant and freedom from fault of his own, the conclusion must follow that it was error to deny a right to recovery both under the common law and section 6330—1.

Accordingly the judgment is reversed, with costs, and the case is remanded for further proceedings not inconsistent with this opinion.

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UNITED STATES DISTRICT COURT.

D. OREGON

ROHDE

v.

GRANT SMITH PORTER CO.*

1. ADMIRALTY—JURISDICTION — TORTS — PERSONAL INJURIES.

A servant's personal injuries, occurring not only on navigable waters, but while libelant was at work on a vessel, constitute a maritime tort, of which the admiralty court has jurisdiction.

(For other cases, see Admiralty, Dec. Dig. § 20.)

2. ADMIRALTY — JURISDICTION — PERSONAL INJURIES — STATE LAWS NOT EXCLUSIVE REMEDY.

As the federal courts, under Act Oct. 6, 1917 (Comp. St. 1918, §§ 991 [3], 1233), have cognizance of all civil causes of admiralty and maritime jurisdiction, exclusive of the state courts, saving to suitors the common-law remedies, and the rights and remedies under the Workmen's Compensation Act of any state, if they elect to pursue them, the remedy under the Oregon Compensation Act as amended is not exclusive, and the federal courts must administer maritime law unaffected by state statutes.

(For other cases, see Admiralty, Dec. Dig. § 20.)

3. ADMIRALTY—MARITIME TORTS—LIABILITY MEASURED BY FEDERAL AND NOT STATE LAW.

Where an employee seeks redress for a maritime tort in an admiralty court, either in rem or personam, the rights, obligations, and liabilities of the respectives parties must be measured by the maritime law, as provided by Congress, or the general principles thereof, and the right can not be barred, enlarged, or taken away by state legislation.

(For other cases, see Admiralty, Dec. Dig. § 20.)

In Admiralty. Libel by Herman L. Rohde against the Grant Smith Porter Company. On hearing upon exceptions to the jurisdiction. Exceptions overruled.

Lee Roy E. Keeley, of Los Angeles, Cal., for libelant.

Carey & Kerr and Chas. A. Hart, all of Portland, Or., for respondent.

BEAN, D. J. This is a libel in personam, brought by an employee of the respondent to recover damages for a personal injury alleged to have been received while doing carpenter work on a vessel after it had been launched, machinery installed, and practically completed, due, it is alleged, to the actionable negligence of the respondent. Exceptions have been filed on the grounds (1) that the court is without jurisdiction, because the injury complained of is not a maritime tort; and (2) if it is a maritime tort, and the court has jurisdiction, the libelant is denied a recovery because of the Oregon Compensation Act.

*Decision rendered, June 23, 1919. 259 Fed. Rep. 304.

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[1] The questions thus raised are doubtful and not easy of solution. I only state my best information, after carefully considering them, and without elaboration. As a general rule the test of admiralty jurisdiction in cases of tort is locality, and where the wrong complained of is committed wholly upon the high seas, or navigable waters, it is within such jurisdiction. 1 Cyc. 842; Swayne & Hoyt v. Barsch, 226 Fed. 581, 141 C. C. A. 337; The Plymouth, 3 Wall. 20, 18 L. Ed. 125; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; Leathers v. Blessing, 105 U. S. 626, 26 L. Ed. 1192.

The injury complained of in this case, it is alleged, occurred not only on navigable waters, but while the libelant was at work on a vessel (under Judge Deady's interpretation of that term in The Eliza Ladd, Fed. Cas. No. 4,364). It would seem, therefore, to constitute a maritime tort, of which the admiralty court has jurisdiction.

[2] The contention that the court is denied the right to proceed with the case, and afford relief according to the rules applicable, if the libelant is entitled thereto, because of the Oregon Compensation Act (Laws 1913, p. 188, as amended), is, in my judgment, not sound. The Constitution of the United States and the Judiciary Act give the courts of the United States cognizance of all civil causes of admiralty and maritime jurisdiction, exclusive of the state courts, saving to suitors the right to a common-law remedy where the common law is competent to give it, and the rights and remedies under the Workmen's Compensation Act of any state. Act Oct. 6, 1917, c. 97, 40 Stat. 395 (Comp. St. 1918. §§ 991 [3], 1233). The rights and remedies under the common law and the state Compensation Acts are not given by the Judiciary Act; but they are saved by it and are open to the libelant, if he elects to pursue them, but they are not his exclusive remedy. From a very early age the courts of admiralty have exercised jurisdiction over maritime torts. "Every species of tort," says the court in The Plymouth, supra, "however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance," and it is well settled that the maritime law must be administered by the federal courts where they have jurisdiction unaffected by state statutes. The Theilbok, 211 Fed. 685; 241 Fed. 209, 154 C. C. A. 129; Butler v. Boston S. S. 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Swayne & Hoyt v. Barsch, supra; The Henry B. Smith (D. C.) 195 Fed. 312; Atlantic Transport Co. v. Imbrovek, supra; The Moses Taylor, 4 Wall. 412, 18 L. Ed. 397; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Chelentis, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; Workmen v. Mayor, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas 1917E, 900.

Judge Story says in The Chusan, Fed. Cas. No. 2, 717:

"In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and, in the absence thereof, by the general principles of the maritime law. The states have no rights to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have any right to prescribe any rule, they have a right to prescribe all rules—to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least as far as I have any knowledge, either by any state court or national court within the whole Union. For myself, I can only say that, during the whole of my judicial life, I have never, up to the present hour, heard single doubt breathed upon the subject."

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[3] Counsel for respondent makes a distinction between jurisdiction and the right of recovery, claiming that, while an admiralty court may, because of the locality, have jurisdiction of a suit by an employee against his employer to recover damages for a personal injury due to the negligence of the latter, the right is not one given by the general maritime law, and therefore the relief, if any, is governed by the common law, modified by statute.

I do not so read the decisions. That was in principle the question presented in the Jensen Case, which involved the right of the workmen's commission of New York to compel the employer of a stevedore killed while unloading a vessel in New York Harbor to pay the award of the commission to his widow and children, as provided by the local law. The employer defended on the ground that his liability, if any, was to be determined by the maritime law, and not the local statute, and his position was sustained; the court saying:

"Article 3, § 2, of the Constitution, extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction;' and article 1, § 8, confers upon the Congress power 'to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. * * * And further that, in the absence of some controlling statute, the general maritime law as accepted by the federal courts constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

I conclude, therefore, that where a party seeks redress for a maritime tort in an admiralty court, either in rem or in personam, the rights, obligations, and liabilities of the respectives parties must be measured by the maritime law as provided by Congress, or the general principles thereof, and that the right cannot be barred, enlarged, or taken away by state legislation.

Exceptions will therefore be overruled.

SUPREME COURT OF CALIFORNIA.

BANK OF LOS BANOS ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.
(Sac. 2926.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SELF-INSURANCE—DEPOSIT OF SECURITIES—DISCRETION OF COMMISSION.

Under Workmen's Compensation Act, § 29, requiring an employer to secure payment of compensation in one of specified ways, discretion of commission, when giving consent to self-insure, to require deposit of bond or securities, is not limited to a case where there is reasonable doubt

*Decision rendered, Aug. 26, 1919. 183 Pac. Rep. 538.

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at the time of the employer's ability; a purpose of the act being to secure prompt payment, and such ability being subject to change.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SELF-INSURANCE—DEPOSIT OF SECURITIES—DISCRETION OF COMMISSION.

For Industrial Accident Commission, on granting employer certificate of consent to self-insure, under Workmen's Compensation Act, § 29, to require it to deposit $20,000 in bonds *held,* in view of magnitude of its business and probability of frequent injuries to its employees, not an abuse of discretion.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

In Bank.

Application by the Bank of Los Banos and others for certiorari to review action of the Industrial Accident Commission of California. Order to show cause discharged.

Edward F. Treadwell, of San Francisco, for petitioners.

Christopher M. Bradley and A. E. Graupner, both of San Francisco (W. H. Pillsbury. of San Francisco, of counsel), for respondent.

MELVIN. J. Application was made for certiorari to review the action of the Industrial Accident Commission in requiring of Miller & Lux, Incorporated (a corporation), the filing of a bond in the sum of $20,000, or the depositing of securities of that value, as a prerequisite to the carrying of its own compensation insurance by the corporation. The other petitioners are corporations, and are companies subsidiary to Miller & Lux, Incorporated. Upon filing of the petition an order to show cause was made.

All of the petitioners asked permission to demonstrate their ability to self-insure. Their applications were heard, and the counsel for the Industrial Accident Commission wrote to counsel for petitioners a letter containing, among other things, the following language:

"The commission notes that Miller & Lux, Incorporated, has listed among its assets 'United States Liberty Bonds' (first and second issues). $28,000. If you will deposit $20,000 of the 'Liberty Bonds' listed by you in the manner and form prescribed by the commission, certificate of consent to self-insure will be issued to Miller & Lux, Incorporated, and that company will be acceptable to the Industrial Accident Commission as the surety for the San Joaquin & Kings River Canal & Irrigation Company, West San Joaquin Valley Water Company, Bank of Gustine, and Bank of Los Banos."

The showing made by Miller & Lux, Incorporated, before the Industrial Accident Commission, indicates that it has many millions of dollars surplus and that it is amply able to self-insure. The petitioners contend that solvent employers, having assets commensurate with the hazard, should be permitted to self-insure without the deposit of security or the giving of a surety bond, and that the exacting of such security or bond as prerequisite to permission for petitioners to self-insure amounts to an abuse of discretion on the part of respondent.

Petitioners first attack the action of respondent on the ground that it is based upon an arbitrary rule applied to all corporations or others seeking self-insurance, and not upon any real investigation of the merits of these particular requests. The letter of the counsel for the Industial Accident Commission indicates, however, that there was some consideration of the facts, both of solvency and of corporate association, be-

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cause, instead of demanding a bond or a deposit from each petitioning corporation, the commission was willing to allow Miller & Lux, Incorporated, to carry the insurance for itself and its subsidiary corporations.

[1] We must decide, therefore, whether or not any bond or deposit may be required, and if that question be answered in the affirmative, whether or not the amount ($20,000) is reasonable, under all the circumstances.

By the Workmen's Compensation Act of 1917 (Stats. 1917, p. 831), it is provided (page 857) that—

"Every employer as defined in section seven hereof, except the state and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

"1. By insuring and keeping insured against liability to pay compensation in one or more insurance carriers duly authorized to write compensation insurance in this state.

"2. By securing from the commission a certificate of consent to self-insure, which may be given upon his furnishing proof satisfactory to the commission of ability to carry his own insurance and pay any compensation that may become due to his employe. The commission may, in its discretion, require such employer to deposit with the state treasurer a bond or securities approved by the commission, in an amount to be determined by the commission. Such certificate may be revoked at any time for good cause shown."

Petitioners insist that the commission may require the bond or securities specified in the statute when there is any reasonable doubt of the employer's ability to carry his own insurance, but that where no such doubt exists the commiission must grant the certificate of consent without the giving by the applicant of any security. There might be some force in this position if solvency of the petitioning employer were the only matter involved, but the highest purpose of the workmen's compensation statutes is not merely to obtain payment of just claims, but to have such demands promptly adjudicated and paid in such way as to be available to the injured employess when most needed. Any corporation, no matter how rich, may be subject to lawsuits, and it is easily conceivable that all the funds of a given corporation might be held by injunction, or other order of court, in such manner as not to be immediately available for settlement of awards of compensation found by the Industrial Accident Commission. It is therefore highly desirable that a proper fund or bond be provided and that such security be under the control of the Industrial Accident Commission. The requirement of security is also justified by the fact that payments of compensation sometimes extend over long periods of time. A corporation solvent at the time it may secure permission to carry its own compensation insurance may have many changes in its financial status during the years of its obligation to pay persons who may be injured while in its service. The fund, or bond, authorized by the statute not only keeps safe the installments of indemnity due from time to time to the injured employes, but it makes unnecessary the otherwise constant watchfulness of the Industrial Accident Commission over the possibly diminishing resources of the self-insurer.

Upon this phase of the discussion we are constrained to quote some of the language of Mr. Justice Pitney, who delivered the opinion of the Supreme Court of the United States in the case of New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. To be sure, the exact question here under discussion was not there involved. Nevertheless, the observations of the learned justice, made while expressing the court's opinion, are quite pertinent. At page 208 of the report in 243 U. S., at page 255 of 37 Sup. Ct. (61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629), we find the following language:

'We conclude that the prescribed scheme of compulsory compensation

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is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By section 50, this may be done in one of three ways. (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of $300,000, under section 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under section 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

"The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employes, and the amount of its pay roll (about $50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested."

Section 50 of the New York act of 1914 (chapter 41, Laws of 1914 is substantially the same as our own statute with reference to self-insurance.

[2] Undoubtedly, following the suggestion set forth above, this court would not so construe the statute as to give "unbridled discretion to the commission." We cannot say, however, from the record before us, that the Industrial Accident Commission abused its discretion when acting upon the applications of these petitioners. This record discloses the fact that petitioners are engaged in very extensive business operations of many sorts. These activities are only made possible by the employment of many persons. It is not improbable that casualties may occur within the near future and we cannot justly say that the security demanded is disproportionate to the reasonable probability that such unfortunate happenings may be more than a few. Payments of compensation usually extend over a considerable period of time, being frequently made weekly for 240 weeks. The liability of the employer is therefore cumulative, and may increase from year to year. As counsel for respondent well say:

"If an employer had one maximum liability a year for five years, he would, during the fifth year, be paying upon all five injuries, and his total liability to all claimants during that year would be in the neighborhood of $20,000, without allowance for any further injuries occurring in that year."

In view of the magnitude of the business of petitioners, and the probability of frequent injuries to their employes, we cannot say that this record reveals an abuse of discretion on the part of the Industrial Accident Commission.

The order to show cause is discharged.

We concur: Angellotti, C. J.; Shaw, J.; Lawlor, J.; Olney, J.; Wilbur, J.; Lennon, J.

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SUPREME COURT OF CALIFORNIA.

UNITED STATES FIDELITY & GUARANTY CO.

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.
(S. F. 9017)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACT—DECISION BY COMMISSION—OPINION EVIDENCE.

The Industrial Accident Commission is not bound to decide in accordance with opinion evidence as to the speed at which an employe was driving an auto by the overturning of which he was killed; but it is its duty to pass on the evidence, and decide the fact.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD BY COMMISSION—REVIEW—SUFFICIENCY OF EVIDENCE.

Circumstantial evidence that an employe when killed by overturning of auto was exceeding the speed limit *held* insufficient, particularly in view of the presumption against commission of crime, to justify annulling of award of Industrial Accident Board as unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

In Bank.

Proceeding under the Workmen's Compensation Act for death of Joe Marazzo, employe of Bisceglia Bros. Canning Company. Award was made to heirs by the Industrial Accident Board, and the United States Fidelity & Guaranty Company, insurer, petitions for review. Award affirmed.

Thomas, Beedy & Lanagan. of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondent.

Wilbur, J. [1, 2] Respondent commission made an award in favor of the heirs of Joe Marazzo, an employe of Bisceglia Bros. Canning Company. Marazzo was killed while driving an automobile on his return from San Felipe Rancho to San Jose. The only point made by the petitioner is based upon the claim that at the time of the accident the deceased was driving more than 30 miles an hour, in violation of the motor vehicle act, and that, therefore, he was not engaged in the course of his employment. The commission found that the deceased was engaged in the course of his employment at the time of his death, and if we assume, as contended by the petitioner, that the fact that the deceased was violating the motor vehicle act by exceeding the speed limit took him out of the course of his employment, then the finding is, in effect, a finding that the deceased was not exceeding the speed limit. The petitioner applied for a rehearing before the commission, averring that all the evidence supports but one inevitable finding, that said automobile was being operated at a rate of speed in excess of 30 miles per hour; * * * that the death of the deceased was caused by an accident which was due to driving said automobile at a speed in excess of 30

*Decision rendered, August 26, 1919. 183 Pac. Rep. 540

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miles per hour." In the order denying the rehearing the commission found "that the allegation that the said injury was caused by driving in excess of 30 miles per hour, in violation of the statute and orders of the employer was not substantiated by the evidence." The commission having found, in effect, that the deceased was not violating the law with reference to speed, the qus'jon for our consideration is whether there was substantial evidence to support the finding. It is true that there was evidence offered tending to show that the speed exceeded 30 miles an hour. This evidence was wholly circumstantial, and consisted in showing the power and the condition of the capsized automobile, and of marks upon the highway, showing that the automobile had swerved from the paved portion thereof, first to the right and then to the left, and had skidded about 90 feet before overturning. Witnesses testified that the automobile—a heavy two-ton Hudson Super-six—in their opinion must have been going at a rate of speed in excess of 30 miles an hour. It was conceded by these witnesses, however, that such marks as were found upon the highway might have been made by such an automobile going 30 miles an hour or less. The commission was not bound to decide in accordance with the opinion evidence. It was its duty to pass upon the evidence and decide the fact, and we cannot say that the circumstantial evidence of excessive speed is sufficiently compelling to justify us in annuling the award as unsupported by the evidence, particularly in view of the presumption of law that the deceased was not committing a crime, viz. violating the motor vehicle act.

The award is affirmed.

We concur: Angellotti, C. J.; Lennon, J.; Melvin, J.; Lawlor, J.

SHAW, J. (concurring). I concur in the judgment, but for reasons different from those stated by M. Justice Wilbur. In my opinion the evidence showed conclusively that the automobile was going at a rate exceeding the lawful limit of 30 miles an hour at the time it overturned. The marks upon the highway were of a character that could not have been made unless the speed was in excess of that limit. There is no direct evidence, however, tending to prove that Marazzo was knowingly driving in excess of the speed limit. The accident occurred about 11 o'clock at night. He may not have been able to see the speed gauge of the automobile, assuming that there was one, owing to the darkness. The difference between a speed in excess of 30 miles an hour and a speed under that rate, especially at night, is often imperceptible to those in the vehicle. The fact that the accident which caused the injury was the result of willful negligence of the injured employe is not a defense to an application for an award under the Workmen's Compensation Act of 1917 (St. 1917, p. 831) when the injury causes his death. The act does not provide that the employer shall not be liable where the act of the employe which causes death is a violation of law. The theory that such fact is a defense can only be sustained upon the general principle that no one can be allowed to receive the benefit of the workmen's compensation law for an injury resulting from a violation of some other law by the injured party. I do not say that such principle should be laid down as a matter of public policy in such cases as the one at bar. The act does not so declare, and it would seem to be a matter of policy properly within the control of the Legislature. But if such principle should prevail, I think that, as applied to this law, it should be limited to cases where the act of the employe was either morally vicious in itself, as well as a violation of express law, or a conscious violation of a law that is merely prohibitory in character. Nothing of the kind appears, and therefore the evidenc5e sustains the award.

I concur: Olney, J.

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DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1.

HARTFORD ACCIDENT & INDEMNITY CO.

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.
(Civ. 2948.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION—TIPS—"OTHER ADVANTAGES" RECEIVED BY EMPLOYE.

Tips received by employe are "other advantages received by the injured employe as part of his remuneration," within the meaning of Workmen's Compensation Act § 17b, as amended by St. 1915, p. 1087, and should be considered in determining the "average weekly earnings" of the employe for the purpose of fixing compensation.

(For other cases, see Master and Servant Dec. Dig. § 385[1].)

2. STATUTES—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—ADOPTION OF FOREIGN STATUTE.

Compensation acts of this country being generally based upon the English Workmen's Compensation Act, the rulings of the commission and courts of England are persuasive, where the language of the statute is not materially dissimilar.

(For other cases, see Statutes, Dec. Dig. § 226.)

Proceedings by H. F. Weidemann under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by A. J. Wagner, the employer, and the Hartford Accident & Indemnity Company. There was an award of compensation, and the indemnity company applies for a writ of review. Award affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for petitioner.

A. E. Graupner and Warren Pillsbury, both of San Francisco, and John R. Cronin, of Stockton, for respondents.

RICHARDS, J. This is an application for a writ of review. The petitioner was the insurer of one A. J. Wagner at the time of the injury for which compensation was sought by one H. F. Weidemann, an employe of said Wagner. Weidemann was a waiter employed in a hotel owned and operated by his employer in Stockton, Cal., on August 15, 1916, the date of his injuries. According to the findings of the Industrial Accident Commission he was at that time earning $45 per month in regular wages and his board amounting to $30 per month. In addition to the foregoing earnings he received tips averaging $1.25 per day. The commission based its award not only upon the aforesaid regular wages and board of the applicant for compensation, but also upon the amount so being received by him in tips at the time of his injury. It is this portion of the award to which the petitioner herein objects in this proceeding, basing its objection upon the following two grounds: First, that the undisputed evidence showed that the applicant for compensation was paid the sum of $5 per month more than other waiters, which was to be in lieu of tips

*Decision rendered June 12, 1919. 183 Pac. Rep. Rep. 234.

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and which was included in his regular wages of $45 per month, for which allowance in his award was fully made; second, that under the Workmen's Compensation Act of California (St 1913, p. 279) tips are not the proper subject of an allowance in the case of injured employes.

As to the first of the foregoing contentions, we do not find it is borne out by the evidence in the case. The applicant for compensation was one of the waiters in the establishment of his employer, but in addition to his regular duties as such he was required during a portion of his time to absent himself from the regular dining room in order to wait upon the officers and certain other employes of the hotel in their private dining room, and for this special service he received an extra $5 per month. It does not appear that this increase in wages was expressly to be in lieu of all tips he would receive in the course of his regular duties. The findings of the commission, on the contrary, would seem to show that during such regular service he actually did receive a sum averaging $1.25 per day from that source, upon the basis of which the extra allowance was made which is objected to in this proceeding. The first point urged by the petitioner is therefore without merit.

[1, 2] As to the petitioner's second objection, viz. that tips are not to be made the basis of an allowance to an injured employe under our California statute, we are also unable to give our assent to the petitioner's contention. It is insisted first that under the terms of the Workmen's Compensation Act the remuneration received by the employe and which forms the basis of the award must come directly from the employer; second, that tips, not being included in the employer's pay roll, could not be considered in calculating an award; third, that the insurer's policy does not cover remuneration other than that which passes from employer to employe. The answer to these several contentions is contained in section 17b of the Workmen's Compepnsation Act as amended in 1915 (St. 1915, p. 1087), which reads as follows:

"In determining such average weekly earnings, there shall be included the market value of board, lodging, fuel and other advantages received by the injured employe, as part of his remuneration and which can be estimated in money, but such average weekly earnings shall not include any sum which the employer paid to the injured employe to cover any special expenses entailed on him by the nature of his employment."

We are satisfied that the phrase "other advantages received by the injured employe as part of his remuneration and which can be estimated in money" is broad enough to permit the inclusion of tips in the "average weekly earnings" of such employe, upon which the amount of his award is to be calculated. There is nothing in the act which can be construed as restricting the earnings of the employe either to those which the employer directly pays to him in the form of wages, or to those which are embraced within the employer's pay roll. The Workmen's Compensation Acts of this country are, generally speaking, based upon the English Workmen's Compensation Act, and the rulings of the commission and courts of England are persuasive where the language of the statutes is not materially dissimilar. The question as to whether tips were to be considered in estimating the compensation of injured employes has been uniformly decided in favor of their inclusion under the English statute. Penn v. Speirs, etc. (1908) 1 K. B. 766, 4 B. W. C. C. 401; Skailes v. Blue Anchor Line (1911) 1 K. B. 360, 4 B. W. C. C. 16; Knott v. Tingle, etc., Co., 4 B. W. C. C. 55; Gt. Northern Ry. Co., 7 W. C. C. 177; Helps v. Gt. Western Ry. Co. W. C. & Ins, Rep. 199.

The statutes of Massachusetts and New York, whose statutes are even less broad in their definition as to what earnings of the employe are to be made the basis of his award, have each followed the English rule as declared in the foregoing cases and proceedings. Hatchman v. New England Casualty Co., 2 Mass. I. A. B. 419; Sloate v. Rochester Taxi Co., 221 N. Y. 491, 116 N. E. 1076.

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In the latter case the court quite aptly says:

"The employe could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer similar in effect to board, lodging or rent furnished in addition to the wages paid. * * * The usual tips have come to be considered as a part of the cost of entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the persons served to pay. In effect, therefore, the employer and not the employe alone is benefited * * * by the patrons of the company. * * * The court should treat these tips in the same manner in which the employer and employe treat them, as a part of the compensation to be received by the employe for the services rendered the employer—a part of the wages, a part of the average annual earnings of the employee."

We are satisfied with the reasoning and conclusion of the foregoing authorities and with the action of the respondent herein, which was based thereon. We are also satisfied that the policy of the petitioner herein covers the entire liability imposed upon the employer by the terms of the California statute.

The award of the commission is affirmed.

We concur: Waste, P. J.; Kerrigan, J.

SUPREME COURT OF ERRORS OF CONNECTICUT.

CHIULLA DE LUCA
v.
BOARD OF PARK COM'RS OF CITY OF HARTFORD.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—COMMISSIONER'S FINDINGS—REVIEW.

An appeal to the superior court from the finding and award of the compensation commissioner is an original application involving the exercise of judicial power, and if finding and award are within the limits of his powers, and are not so unreasonable as to justify judicial interference, his decision must stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—COMPENSATION COMMISSIONER—TAKING NOTICE OF SCIENTIFIC AUTHORITY.

The compensation commissioner had the power to take notice of scientific authority and data in reaching the conclusion complained of.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—COMMISSIONER'S FINDINGS—REVIEW.

The finding of the compensation commissioner that in case of a thunderstorm "there is greater danger under a tree or in the open than when protected in a house" must stand; it being consistent with the evidence and not contrary to reason.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

* Decision rendered, July 31, 1919. 107 Atl. Rep. 611.

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6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEATH BY LIGHTNING.

A park workman who obtained shelter under a tree during a violent thunderstorm and was killed by lightning while waiting to resume his work *held* injured in the course of his employment, so as to entitle his widow to compensation for his death.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Case reserved from Superior Court, Hartford County; William S. Case, Judge.

Proceedings by Guiseppina Chiulla de Luca for compensation for the death of her husband, opposed by the Board of Park Commissioners of the City of Hartford. From the findings and award of the Compensation Commissioner taken to and reserved by the superior court for the advise of the Supreme Court of Errors, defendant appeals. Superior Court advised to affirm award.

The finding shows that on July 30, 1918, the deceased was employed by the defendant in Colt Park, in the city of Hartford, in raking leaves. While so employed, a thunder storm of considerable violence arose, and he and a fellow workman took shelter under a nearby tree. While the deceased was thus being sheltered, the tree was struck by lightning, and he was instantly killed. No other shelter had been provided for the deceased, and in seeking partial protection from the tree he was doing a natural thing and one which had hitherto been practiced under the employment of the defendant in similar circumstances.

There is a clear preponderance of scientific authority to the effect that there is a greater danger under a tree or in the open than when protected in a house. This is shown by statistics and by authoritative scientific dicta.

Notice is taken of the commonly known fact that nearly all of the persons in a community such as Hartford are protected by dwelling houses, business blocks, or factories in time of a violent thunder shower, and that the injured workman was subject to a greater hazard than that experienced by the community at large.

The plaintiff is the widow of the deceased, and was dependent upon him for support at the time of his death.

Robert P. Butler and Andrew J. Broughel, both of Hartford, for appellant.

Ralph O. Wells, of Hartford, for appellee.

RORABACK, J. (after stating the facts as above). The defendant contends that the compensation commissioner erred in finding that—

"There is a clear preponderance of scientific authority to the effect that there is greater danger under a tree or in the open than when protected in a house. This is shown both by statistics and by authoritative scientific dicta."

The question presented by this assignment is one of fact. In passing upon the proposition it is of importance to notice some of the principles which direct the course of the proceedings before a compensation commissioner. This court has said:

"He may hear the applicant at his residence. He proceeds to hearing without pleadings and without regard to the ordinary rules of evidence. He may make his inquiry through oral testimony or written and printed records best calculated to ascertain the substantial rights of the parties."

[1] An "appeal to the superior court from the finding and award of the commissioner is an original application invoking the exercise of the judicial power of the superior court in order to determine whether the findings and award of the commissioner are so unreasonable as to justify

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judicial interference, and whether they are within the limits of the powers vested in him. If they meet this test, the decision reached by the commissioner must stand; otherwise his award may be set aside by the superior court. Powers v. Hotel Bond Co., 89 Conn. 143, 148, 149, 93 Atl. 245.

[2] To take judicial notice and to apply it to the decision of a case is a right which appertains to every court of justice, from the lowest to the highest, and may be exercised by this court. Arthur v. Norfield Congressional Church, 73 Conn. 731, 49 Atl. 241.

[3] Judicial notice, in its apropriate field, displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary. Brown v. Piper, 91 U. S. 37, 43, 23 L. Ed. 200; Commonwealth v. Marzynski, 149 Mass. 68, 21 N. E. 228. The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument—something which is already in the court's possession, or at any rate is so accessible that there is no occasion to use any means to make the court aware of it. State v. Main, 69 Conn. 136, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30.

"The doctrine of judicial notice is not a hard and fast one, but is modified by judicial discretion, the courts not being bound to take judicial notice of matters of fact, whether they will do so or not being dependent on the nature of the subject, the issue involved, and the apparent justice of the case." City of St. Louis v. Niehaus, 236 Mo. 8, 16, 139 S. W. 450, 452.

[4] It is clear that the compensation commissioner had the power to take notice of scientific authority and dicta in reaching the conclusion complained of.

[5] We do not decide that there is greater danger under a tall tree in a thunder shower than in other places, but we have no hesitation in holding that the commissioner did not find this decisive fact without substantial evidence.

Thus in Appleton's American Encyclopedia, vol. 10, p. 463, it is stated that—

"Dangerous is it therefore to take shelter under a tree during a thunder gust."

In the latest addition of the Americana (volume 12), under the title "Lightning," the writer says that—

"Fatalities are everywhere increased by the tendency to seek shelter from the rain when caught in a storm; and these isolated shelters, as trees, barns, monument buildings in public parks, etc., are among the most liable to be struck."

In the Encyclopedia Britanica, vol 2, (11th, Ed.) p. 869, § 35, under the title "Atmospheric Electricity," the writer says:

"The fact that a considerable number of people sheltering under trees are killed by lightning is generally accepted as convincing proof of the unwisdom of the proceeding. Where there is an option between a tree and an adjacent house, the latter is doubtless the safer choice."

See, also, Paul Burt's "First Steps in Scientific Knowledge," p. 52.

In Harper's Magazine, vol. 41, p. 33, a tall tree is portrayed with electricity flowing from the highest point of the tree to the ground. This illustration is designated "The Natural Lightning Rod." This illustration appears in an article entitled. The mysteries of a Thunder Shower," which was written by Jacob Abbott, a famous juvenile writer and educator.

To repeat: The compensation commissioner has found that—

"There is a clear preponderance of scientific authority to the effect that there is greater danger under a tree or in the open than when protected in a house."

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This finding should stand, as it is not contrary to reason and is consistent with the evidence.

[6] The remaining reasons of appeal present the claim that as a matter of law under no circumstances can death by lighting constitute a personal injury for which an allowance can be made under our Compensation Act.

If the place under the tree were the more dangerous, the fact that the deceased chose it as the place of refuge from the storm and that he was injured at this place does not prevent recovery. The act of seeking and obtaining shelter arose out of, that is, was within, the scope or sphere of his employment and was a necessary adjunct and an incident to his engaging in and continuing such employment. Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over was not only necessary to the preservation of the deceased's health, and perhaps his life, but was incident to the deceased's work, and was an act promoting the business of the master. L. R. A. 1916A, 348.

See, also, Richards v. Indianapolis Abattoir Co., 92 Conn. 277, 102 Atl. 605, where it is said that—

The plaintiff "was injured while on duty, in his working hours, when waiting for an opportunity to continue his service of employment. The accident occurred when the plaintiff was at a place where he might reasonably be. There was no turning aside upon his part, no attempt to serve ends of his own."

In Griffith v. Cole (Iowa 1917) 165 N. W. 577, L. R. A. 1918F, 923, 15 N. C. C. A. 674, cited by the defendant as the most exhaustive American case "thus far reported on this subject," appear these significant statements:

"It is not intended to hold that injuries from lightning can in no case be due to an industrial employment. It has been rightly said that they can be. * * * Cases that hold a given accident from lightning did not arise out of the course of the employment recognize such injury may be related to the employment. See Hoening v. Commissioner, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339. And so of Roger v. School Board, 1 Scots Law Times, 271, wherein it is said that "To be struck by lightning is a risk known to all and independent of employment, yet the circumstances of a particular employment might make the risk not of a general risk, but a risk sufficiently exceptional to justify its being held that the accident from such risk was an accident arising out of the employment."

Consistently with these decisions this court has repeatedly held that—

"A personal injury to an employee which is sustained while he is doing what he was employed to do, and as a proximate result thereof, 'arises out of and in the course of' his employment."

"An injury which is the natural and necessary incident of one's employment is proximately caused by such employment; as it is also when the employment carries with it a greater exposure to the injury sustained than the exposure to which persons generally in that locality are subjected."

Our latest case sustaining this proposition is Ahern v. Spier, 93 Conn. 151, 105 Atl. 340.

The superior court is advised to affirm the award of the compensation commissioner.

The other judges concurred.

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SUPREME COURT OF ERRORS OF CONNECTICUT.

FIARENZO

v.

RICHARDS & CO. et al.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —INJURIES ARISING OUT OF EMPLOYMENT.

Where a laborer was killed when he slipped under his employer's truck upon which he attempted to ride while it was going in the direction in which it was necessary for him to go to perform further duties, the injury was one in the course of and arising out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT—INJURIES TO SERVANT—WILLFUL MISCONDUCT.

A laborer, killed in attempting to ride on his employer's truck going in the direction in which it was necessary for him to go to perform further duties, *held* not guilty of willful misconduct preventing compensation, though there were general instructions against riding trucks, it not appearing that employees were discharged for riding trucks, or that he had ever been instructed to keep off.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

Appeal from Superior Court Fairfield County; Frank D. Haines, Judge.

Claim by Mary Fiarenzo against Richards & Co., and others, employer, etc., for compensation under the Workmen's Compensation Act for the death of her husband. On appeal by the respondents an award to claimant was affirmed, and respondents again appeal. No error.

This is an appeal from the doings of the compensation commissioner in awarding compensation to the widow of one Fiarenzo for his death while in the employment of Richards & Co., respondents. The material facts are set forth in the finding and, so far as involved in the appeal, are these; Fiarenzo was employed by the respondent company as a laborer, and on April 27, 1917, with three other men in charge of the head shipping clerk, walked a distance of about 700 feet from the factory of the employer to the company's dock in Stamford Harbor and assisted in straightening out a shipment of in-coming freight. After finishing the job the men started back to the upper factory with the shipping clerk, and when they arrived at the office it was discovered that Fiarenzo was not with them. Inquiry was made of the other men as to the whereabouts of Fiarenzo, but they did not know. The shipping clerk turned around, looking for the deceased, and saw the company's truck swinging around the corner of the building coming up the driveway, but he did not see Fiarenzo. On their way from the dock to the upper factory they noticed this truck standing in front of a so-called washhouse about 50 feet from the dock. As the shipping clerk turned around a second time he saw Fiarenzo make a jump for this truck, miss it, and slide under it. The rear wheels passed over

*Decision rendered, July 16, 1919. 107 Atl. Rep. 563.

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his chest. The deceased was picked up, and received medical attention, but died later in the day.

The accident occurred within the period of his employment, on the property of his employer, and reasonably carrying out the duties of his employment in endeavoring to rejoin his fellow employees to do some further work for the employer. Testimony was presented to show that there were general instructions to the men not to ride on the trucks, but no evidence was presented to show that Fiarenzo had been told that it was against the rules to get on the truck, or that he was told to keep off when he attempted to get on on the day of the accident, and it appeared that employees were in the habit of riding on the truck, athough the driver tried to keep them from doing so. It did not appear that any employee had been discharged because he had ridden on the truck. It was not an unnatural thing for Fiarenzo to attempt to ride on this truck, as the truck was owned and operated by his employer, running on property of his employer and going in the direction in which he himself was going.

On these facts the commissioner ruled that the deceased was not guilty of serious and willful misconduct; that the accident which caused his death arose out of and in the course of his employment, and therefore the claimant was entitled to compensation within the meaning of the act, and compensation was awarded his widow, the claimant. From this award the respondents appealed.

Leonard J. Collins, of Hartford, for appellants.
John J. Cuneo, of South Norwalk, for appellee.

GAGER, J. (after stating the facts as above). This is an appeal from the action of the superior court confirming an award of the compensation commissioner. There are six reasons of appeal upon the record, but as the appellants say in their brief, they state only two distinct reasons which are pressed: First, that the commissioner and the court erred in holding that the injury to Fiarenzo arose out of his employment; second, in not holding that Fiarenzo was guilty of serious and willful misconduct within the meaning of the act.

[1] The respondents admit that Fiarenzo's injury was received while "in the course of" his employment, but deny that it arose "out of" the employment. The essential facts are simple: Fiarenzo was a laborer. After finishing a job at the respondents' dock some 700 feet from the factory, Fiarenzo was going back from the dock over the respondents' property towards the main office in the line of his service; and while so doing attempted to jump on a truck of the respondents going the same way. He missed his jump, slid under the truck, and received injuries causing death. Did the injuries so received arise out of the employment?

We think the accident was one which arose out of his employment. The deceased, as a laborer, was obliged to pass from one part of his employer's premises to another. Instead of walking all the way, as indeed he might have done, he undertook to ride upon his employer's truck going the same way. In passing from one point to another upon the employer's premises he was doing what his employment necessarily called for. That he should attempt to ride when the opportunity offered was not a departure from his employer's business. It is not found, nor is there any presumption, that any danger was attendant upon such riding. Such attempt to ride was, as matter of common experience, an ordinary and to be expected incident of his employment. He was doing what his employment called for, not necessarily the riding, but the moving from place to place. Upon the finding the act of the decedent was not done in violation of any orders received by him, and it was manifest-

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ly in furtherance of the performance of his duties. Had the deceased slipped and been injured while walking from one place of work to another on his employer's premises in the course of his work, it would hardly be claimed that the injury did not arise out of the employment. What difference did it make that he slipped while attempting to get on the truck for the same purpose?

There was the causal connection between the employment and the injury spoken of in Mann v. Glastonbury Knitting Co., 90 Conn. 119, 96 Atl. 368, L. R. A. 1916D, 86, and in many other cases. There is the proximate cause mentioned in Larke v. Hancock Mutual Life Insurance Co., 90 Conn. 309, 97 Atl. 322, L. R. A. 1916E, 584, as proximate cause is there shaded in meaning when it is said:

"The proximate cause of an injury is not necessarily that which immediately arises out of the employment, but may be that which is reasonably incidental to it."

In Horn v. Arnett, 91 N. J. Law, 110, 102 Atl. 366, a laborer, riding back from unloading with a teamster slipped and was injured and died. Recovery was allowed. In Ross v. Genesee Reduction Co., 180 App. Div. 846, 168 N. Y. Supp. 51. a driver fell through a skylight while pulling a rope used in hoisting materials. The court said, "The act which he attempted was designed to facilitate the work of the master," and referred to the employee as engaged in the actual service of the master, as distinguished from the personal purposes of the employee. A number of analogous cases are collected in the note, 15 Neg. and Corp. Cas. 212.

In various attempts at an abstract statement of the meaning of the expression "arising out of * * * his employment," the terms "causal," "cause," and "proximate cause" are used with some freedom, and it must be confessed, with some looseness of meaning and much vagueness of application. These terms come to us freighted with the meaning given to them in the law of negligence, precise and definitely limited, and used in the discussion of cases where liability is based on fault. This precision is indicated by the maxim, "Causa proxima non remota spectatur." Under the compensation cases where negligence, whether of the master or servant, plays no part, these terms do not seem to be used with the same definiteness of meaning. In the strict legal sense of the terms, as used generally in the law, an employment can seldom be the cause, still less the proximate cause, of a personal injury received by a worker in that employment. That this is true is apparent from a consideration of our standard definition of proximate cause as given by Baldwin, C. J., in Smith, Adm'x. v. Connecticut Railway & Lighting Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. (N. S.) 707:

"That only is a proximate cause of an event, juridically considered, which, in the natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation, separated from its effect by no other act of causation."

This is quite in line with the maxim of Lord Bacon quoted in Holland on Jurisprudence (12th Ed.) p. 152:

"It were infinite for the law to consider the causes of causes and their implications one of another; therefore, it contenteth itself with the immediate cause and judgeth the act by that without looking at any further degree." Maxims, Red. 1.

The immediateness of the connection is concisely stated in Gerhardt v. Bates, 2 Ell. & B. 490, where it is said:

"The wrong and damage must be concatenated as cause and effect."

The employment may be considered as causal in the sense that it is a necessary condition out of which necessarily or incidentally due to the employment arise the facts creating liability, and that is the extent to which the employment must be necessarily connected in a causal sense with the injury. If we run over the cases in which compensation has

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been awarded, it will be found to be rarely true, although it may be true, that the employment itself was, in any hitherto recognized use of the words in law, either the cause or the proximate cause; and yet the decisions are right because, to the rational mind, the injury did arise out of the employment. The real truth appears to be that these words get their meaning as used in the compensation cases from the very phrase they are used to define, viz. "arising out of and in the course of his employment." The terms in question, as hitherto used, if applied strictly, are a limitation upon the scope of the act much more stringent than any construction placed upon it by the courts. The causative danger "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that as a rational consequence:" Rugg, C. J., in the McNicols Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, quoted with approval in Mann v. Glastonbury Knitting Co., supra. This makes the employment only a necessary condition and not a cause in any accurate legal use of the word. The true application of the proximate cause idea and its modifications as used in compensation cases is indicated in the quotation from the Larke Case, given above, which, upon examination, is very far from meaning that the employment is the proximate cause. The real test, after all is not conformity to a definition necessarily colored by the facts of the specific case and made broad enough to cover those facts, and containing terms having their meaning tied up to entirely different considerations from those arising under the Compensation Act. The test is whether it is the judgment of the rational mind that the injury does arise out of the employment. No definition can be substituted for the definite language of the act. Interpretation must be interpretation of the act, and not of some interpretation or attempted paraphrase of the act stated in view of the particular set of facts before the court, and using the terms "cause" and "proximate cause" having a uniform and quite different meaning in the law from that which is applicable in compensation cases. The act itself (section 5341, General Statutes) makes no use of the word "cause" as descriptive of the origin of the injury. The word "cause" is used as applied to "willful and serious misconduct of the injured employee or by his intoxication," and here its use does correspond to its meaning in ordinary legal usage. The absence of any attempt by the Legislatures to tie up the meaning of the act by any use of the words "causes" and "proximate "cause, causal connection, proximate cause," will help or confuse according to the selected meaning of the terms and its application to the facts of the specific case. The point under discussion is really one of a consistent terminolgy. The remarks of Earl Loreburn in Herbert v. Fox & Co. L. R. (1916) 1 App. Cas. 405, 408; 9 W. C. C. (Eng.) 164, are always pertinent:

"Precedents are of little value on such points, for the facts are almost always distinguishable, and reasoning by analogy is dangerous, and the efforts made by courts of law, including this House, to throw light on this difficult act have often proved disappointing, because there has arisen a tendency to treat a judicial dicta delivered secundum subjectam materiam as though they qualified the statutory language."

[2] The other reason of appeal urged is that upon the facts found the decedent was guilty of serious and willful misconduct. As to this the most that can be plausibly urged is that the decedent may have been negligent in attempting to board the truck. The claim is based upon disobedience of positive instructions. It is sufficient to say that the finding shows that, though there were some evidence of general instructions to employes not to board trucks yet it was not shown that the decedent had ever been so instructed or told to keep off when he attempted to get on. It also appeared that employes did ride, though the drivers tried to keep them off. And it also did not appear that any employe had ever

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been so instructed or told to keep off when he attempted to get on. It also appeared that employes did ride, though the drivers tried to keep them off. And it also did not appear that any employe had ever been discharged for riding. At the most there may have been a general rule, though that is not expressly found, but if there was such it was unenforced and not brought home to employes, and therefore is really no rule at all when attempted to be made binding on employes ignorant of its existence. Such a rule so far as it may exist falls far short of showing that any act apparently infringing it constitutes serious and willful misconduct.

As counsel on both sides agree that the questions already discussed in this opinion are the two questions really raised by the appeal, it is unnecessary to further consider the specific reasons of appeal in detail.

There is no error.

The other Judges concurred.

SUPREME COURT OF ILLINOIS.

BRENNAN

v.

INDUSTRIAL COMMISSION ET AL. (No. 12549.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"HAZARDOUS OCCUPATION."

An employe, who is merely engaged in pulling a float over soft cement to level it down in constructing a hard-surface road, is not engaged in a hazardous occupation within the Workmen's Compensation Act, notwithstanding that a cement mixer was used by other employes in prepaing the cement.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second series, Hazardous.)

Error to Circuit Court, La Salle County; Edgar Eldredge, Judge.

Proceeding under the Workmen's Compensation Act by John Moore, opposed by William Brennan, employer. An award was allowed by the Industrial Commission, which was affirmed by the circuit court, and the employer brings error. Reversed, and award set aside.

Zimmerman, Garrett & Rundall, of Chicago, for plaintiff in error.

R. C. Donoghue, of La Salle, and Butters & Clark, of Ottawa, for defendant in error.

FARMER, J. William Brennan, plaintiff in error, is a contractor and had a contract to construct a hard surface on a state-aid road in La Salle county. The construction was a cement base and brick top. In doing the work the cement was mixed by a mixer operated by steam. After the cement was mixed and thrown on the roadway, a float 18 feet long weighing between 400 and 600 pounds, was pulled by employees by

*Decision rendered, June 18, 1919. Rehearing denied Oct. 9, 1919. 124 N. E. Rep. 297.

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hand, by means of ropes attached over the soft cement mixture for the purpose of smoothing and leveling it down. John Moore was employed by plaintiff in error to assist in pulling this float over the cement. It appears it was sometimes necessary to lift up one end of the float. While engaged in lifting an end of the float, Moore's thigh was injured by a tearing or rupture of one of the muscles. The injury incapacitated him for work thereafter, and for some time he received treatment in a hospital, and also from physicians outside of a hospital. He claims the injury is permanent, and that he is incapacitated for manual labor—the only kind of employment in which he was ever engaged. He presented a claim for compensation, and was awarded $5.50 per week for a period of 361 weeks, which, on review by the circuit court, was affirmed. Brennan, the employer, filed a petition in this court for a writ of error, which was allowed, and the case comes here for review.

The important question involved is: Was Moore employed in a hazardous occupation? If he was not, then there is no liability. Defendant in error argues that plaintiff in error was engaged in the work of surfacing a public road with concrete and brick; that in doing this work he used a concrete mixer operated by steam and the ordinary tools for the kind of work he was doing. In support of this contention defendant in error cites McLaughlin v. Industrial Board, 281 Ill. 100, 117 N E. 819, where it was held a common dirt road is not a structure, within the meaning of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i), and that the building or repairing of such a road is not an extrahazardous occupation, within the meaning of the statute. In the opinion in that case the court said that some constructions of public roads might be extrahazardous, where cement mixtures are formed and placed on the road, and where crushed rock is used. This expression is relied on by defendant in error as a decision that constructing or repairing road surfaces with cement mixtures or crushed rock is estrahazardous, and that all persons engaged in any part of the work are subject to and under the Workmen's Compensation Act.

We think this a clear misapprehension of the court's meaning. All the court meant was to limit the decision to the character of the road involved in that case, which was a dirt road, and to not hold, generally, that road repair and construction could in no case be deemed extrahazardous. It is possible that some parts of the work of spreading cement in road construction or repair may be extrahazardous, such as preparing and mixing the material to be spread upon the road; but defendant in error's employment and duties did not require him to engage in or come in contact with this kind of work. His sole employment was to pull the float over the cement after it had been placed on the roadway. This was not extrahazardous, within the meaning of the statute, and because some other employees may have been engaged in some other part of the work that was extrahazardous would not change the character of the defendant in error's employment, or bring him within the provision of the Workmen's Compensation Act. In Vaughan's Seed Store v. Simonini, 2775 Ill. 477, 114 N. E. 163, Ann. Cas, 1918B, 713, it was held section 3 of the Compensation Act refers primarily to the business, and not to the person, of the employer, and its provisions cannot be extended to apply to a cause of action not having any connection with the hazardous occupations mentioned. See, also, Marshall v. City of Pekin, 276 Ill. 187, 114 N. E. 497, and Sanitary District v. Industrial Board, 282 Ill. 182, 118 N. E. 475.

Defendant in error was not engaged in anything extrahazardous, within the meaning of the statute, and the award is set aside, and the judgment of the circuit court reversed.

Judgment reversed and award set aside.

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SUPREME COURT OF LOUISIANA.

CITY OF SHREVEPORT

v.

SOUTHWESTERN GAS & ELECTRIC CO. (No. 22835.)*

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—SUBROGATION.

In action against electric company by a city as subrogee of the widow of a fireman electrocuted while discharging his duties, defendant cannot set up as defenses contributory negligence on part of the city and estoppel because it had not condemned the wire's location.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

On Rehearing.

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—SUBROGATION.

A conventional subrogation made by a widow of a city employee, by which the city was authorized to sue the company through whose fault he was electrocuted for damages due her and her child, and to deduct, from the judgment recovered, the compensation paid her and her child by the city and to turn over the balance, *held* valid under Employers Liability Act, §§ 7, 34, and Civ. Code, art. 2162, though made without the judge's authority provided for by article 353, not being a compromise defined by article 3071.

(For other cases, see Master and Servant, Dec. Dig. § 389.

Provosty J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; J. R Land, Judge.

Action by the City of Shreveport, subrogee, against the Southwestern Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Alexander & Wilkinson and E. W. & P. N. Browne, all of Shreveport, for appellant.

J. C. Henriques, of New Orleans, for appellee.

PROVOSTY, J. In the course of fighting a fire that was inside the second story of a furniture store, the firemen set up a ladder against the sheet iron awning which extended from the building over the sidewalk at the elevation of the second floor, and three of them went up this ladder with the nozzle end of a hose. There was an arc light wire of the defendant company four feet five inches above this awning and six feet eight inches from the building; and below it were two other wires. The foremost firemen managed to pass between this top wire and those below it. The third fireman, just as he stepped from the ladder to the awning, was seen to fall down upon the awning, and to be holding the top wire with one hand, while electrical sparks were spitting out at the place where he had hold of the wire. Whether he had stumbled, or slipped, on the steep awning and caught the wire in his fall ,or had fallen as

*Decision rendered, Jan. 6, 1919. On Rehearing, June 30, 1919. 82 S. Rep. 785. Syllabus by Editorial Staff.

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the result of having put his hand on the wire, is not known. His companions instantly pulled him off; but he was already dead—electrocuted. The water had just begun to spout from the hose. It was after night, but light enough from the flames and from the street lamps for him to have seen the wires, as his companions had done. The city of Shreveport, as his employer, settled with his widow and children her liability to them under the Employers' Liability Law (Act No. 20, p. 44, of 1914), and deeming that under section 7 of said law she was legally subrogated to whatever right they might have to claim damages from the defendant company, and having also obtained from them an express subrogation, brought the present suit.

An exception of no cause of action based upon the supposed ineffectiveness of the subrogation was sustained below. On appeal to this court, the judgment was reversed; this court holding that, while legal subrogation had not taken place, the contractual subrogation was good as to the widow. 140 La. 1078, 74 South. 559. The question as to the validity of the contractual subrogation of the rights of the children was expressly reserved

The reason why the court held that the legal subrogation had not taken place was that the said section 7 of the Employers' Liability Act in making provisions for such logal subrogation mentions only the injured employee himself, saying nothing of "dependents." The decision became final in March, 1917. The Legislature of 1918 (Act No. 38) amended the said section 7, doubtless in view of that decision, by adding after the word "employee" the words "or his dependent"; so that, as the law now stands, the employer who has made a settlement of his liability under said law is subrogated by operation of law not only when the settlement has been with his dependents.

The learned counsel for plaintiff contends that the said amendment controls this case. We think not. The rights of the children could not be taken away from them and transferred to the plaintiff by any act of the Legislature. It would be the divesting of vested rights.

And so far as concerns the contractual subrogation which the mother and tutrix undertook to make for these children, it was nothing more than an alienation of minors' property without observance of the forms prescribed by law for the alienation of minors' property; and therefore null. Were the city to fail in the present suit, the judgment would be in no way binding on the minors, who could obtain the annulment of the said attempted transfer, or subrogation, of their rights, and then renew against the defendant company the present suit.

The exception of no cause of action must therefore be sustained in so far as plaintiff's suit is founded upon the rights of the minors.

On the merits, the case is closely analogous to that of Clements v. Electric Light Co., 44 La. Am. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St.-Rep. 348, where a workman going on a roof to repair it was killed by contact with an insufficiently insulated wire, and the company was held responsible.

[1] Evidence was offered to show that the insulation of wires soon deteriorates under the action of sun and rain, and that therefore it is not commercially possible to keep the wires safely insulated. This was held in the case of Moren v. N. O. R. & L. Co., 125 La. 944, 52 South. 106, 136 Am. St. Rep. 344, not to be a good defense.

There was also some evidence to the effect that the insulation of wires is not for protection, but only for preventing a wasteful escape of the fluid. That view of the matter does not recommend itself to the humanity, not to say the common sense, of the court.

[2] Another defense is that the fireman was a mere licensee, and therefore had to take the premises as he found them, and abide by the consequences. He may have been a mere licensee in so far as the owner of the furniture store was concerned, and might not have had any right

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of action against this owner for any injury received as the result of peculiar conditions in or about this building, though even then circumstances might perhaps alter cases; but certainly was not a license with regard to the defendant company who was occupying with its wires the public street. The cases cited by defendant are New Omaha Thompson, etc., v. Anderson, 73 Neb. 84, 102 N. W. 89; Hamilton v. Minneapolis Desk Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; Beehler v. Daniels, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790; Pennebaker v. San Joaquin L. & P. Co., 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202; Griffin v. U. S. Electric L Co, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; Minneapolis Gen. Elec. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; Memphis Consol. Gas & Electric Co. v. Speers, 113 Tenn. 83, 81 S. W. 595; National Fire Ins. Co. v. Denver Consol. Electric Co., 16 Colo. App. 86, 63 Pac. 949; Cleveland, C., C., etc., Co. v. Ballentine, 84 Fed. 935, 28 C. C. A. 572; Woodruff v. Bowen 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Hector v. Boston Elec. Co., 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554; Sullivan v. Boston & A. R. Co., 156 Mass. 378, 31 N. E. 128; Keefe v. Narragansett Elec. L. Co., 21 R. I. 575, 43 Atl. 542; Hargreaves v. Deacon, 25 Mich. 1; Newark Elec. Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; Denison Light Co. v. Patton, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; Cumberland Telephone v. Martin's Adm'r, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 63 L. R. A. 469, 105 Am. St. Rep. 229.

[3] This fireman was in the ordinary discharge of his duties, and was guilty of no negligence. The fact that his two companions ahead of him saw and avoided this wire does not argue against him. His opportunity for seeing it, or for appreciating at the moment its dangerous character, may not have been as good as theirs. And if even they had failed to observe it, there would have been nothing to wonder at under the circumstances: The imperfect light; the necessary precipitancy of their movements; the flames inside; the excitement; the insecure footing on the steep awning. The man, for all that is known, may have stumbled and fallen against the wire. And we suspect that as he was stepping from the ladder to the awning the stream of water from the hose had already begun to splash about him.

[4] Other defenses are contributory negligence on the part of the plaintiff city, and estoppel because of the city's electrician not having condemned the location of this wire, but having, on the contrary, impliedly approved it by not objecting to it. Suffice it to say of these defenses that the city is not suing in her own right, but is simply enforcing the rights of the widow and children of the decedent.

He was 28 years old in good health, earning $70 a month, and his wife and children were entirely dependent upon him.

Following the Moren Case, supra, the learned trial judge, by whom the case was tried without a jury, allowed for the rights of the widow $5,000.

Judgment affirmed: defendant to pay the costs of the appeal.

Dawkins, J., takes no part.

On Rehearing.

SOMMERVILLE, J. The city of Shreveport, as subrogee of the widow and minor child of Crayton Hilburn, sued the defendant company in damages, and the suit was dismissed on an exception of no cause of action.

On appeal, this judgment was set aside, and the case was remanded for trial on the merits. 140 La. 1078, 74 South. 559.

This suit was based on an alleged subrogation by the widow and

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minor child of the deceased employee of the city of Shreveport in favor of the said city under any by virtue of the terms of the Workmen's Compensation Act (No. 20 of 1914, p. 44). The court held that subrogation did not take place in favor of the city under the act referred to, but that it took place under a conventional agreement entered into between the city of Shreveport and Mrs. Hilburn. The court expressed no opinion as to the validity of the act of subrogation made by Mrs. Hilburn for her minor child.

On the last trial of the case, judgment in favor of Mrs. Hilburn individually was affirmed against the defendant company; but it was held that the conventional subrogation made by her for her minor child was null and void, and that plaintiff, the city of Shreveport, subrogee, could not recover thereon. A rehearing was granted, and we shall now consider the right of plaintiff to recover for the minor Hilburn.

[5] Mrs. Hillburn for herself and her minor child, had two causes of action and two debtors because of the death of Mr. Hilburn. One of the debtors was the city of Shreveport and the other was the Southwestern Gas & Electric Company. The claim against the city for a small, liquidated amount, as compensation, which has been paid in part to her for herself and child by the city, and arrangements have been made to pay the balance in monthly installments. The claim against the Southwestern Gas & Electric Company was for damages in a larger and for an unliquidated amount.

Mrs Hilburn in accepting payment from the city of Shreveport, the smaller debtor, entered into an agreement with it and subrogated it to all her rights and her child's rights in damages against the Southwestern Gas & Electric Company; agreeing that if the city prosecuted the claim successfully against the electric company, at its own expense, she would allow it (the city) to deduct from the amount of the judgment secured against the electric company the small sum paid by the city to her for herself and minor child.

The law authorizes conventional subrogations, and there is no reason why Mrs. Hilburn, as tutrix of her child, should not enter into such an agreement on behalf of that child. The Code says, in article 2162, that the legal or conventional subrogation "cannot injure the creditor, since, if he has been paid but in part, he may exercise his right for what remains due, in preference to him from whom he has received only a partial payment." And in this conventional subrogation entered into between Mrs. Hilburn and the city of Shreveport it was expressly stipulated that the city of Shreveport should pay over to Mrs. Hilburn the full amount of the judgment recovered, less that part which it (the city of Shreveport) had already paid to her for herself and minor child.

The so-called act of subrogation really was a mandate authorizing the city of Shreveport to institute the suit for damages which were due Mrs. Hilburn and her child, with the stipulation that the city was to retain a certain portion of the amount of the judgment which might be recovered against the electric company.

Under such an agreement, there was no parting with any property belonging to the minor, nor was there any compromise of his rights. The tutrix had the undoubted right to enter into the contract without reference to a family meeting, and without authority from the judge.

Article 353 of the Civil Code says that—

"The tutor cannot borrow for the minor, purchase for him immovables or compromise respecting his rights, without an authority from the judge, granted on the advice of a family meeting."

Article 3071, C. C., defines a "compromise" to be:

"A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a law suit, adjust

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their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

"This contract must be reduced to writing."

The law suit between Mrs. Hilburn and the city of Shreveport had been put an end to before the act of subrogation was made, and the judgment in that suit had been settled by the city.

In authorizing the city to sue the electric company for the amount due her and her child as damages, Mrs. Hilburn was beginning a lawsuit; she was not putting an end to one by taking something, which she preferred to the hope of gaining, balanced by the danger of losing. She had all to gain, and nothing to lose by the agreement.

The city was a debtor of Mrs. Hilburn and her child, made such by the fault of the electric company, which was also a debtor. It was to the interest of the city, under the act of subrogation, to sue the electric company for damages, and thus acquit itself of satisfying the judgment rendered against it in favor of Mrs. Hilburn and child.

The city was bound with the electric company, in a certan sense, to compensate Mrs. Hilburn and her child for the death of Mr. Hilburn It might be said to have been bound for the fault of the electric company and for a part of the debt due. The city therefore had an interest in discharging in part the debt due by the electric company to Mrs. Hilburn and her child; and, in acting, it became legally subrogated to their rights.

As was before said, the city clearly became subrogated to the rights of Mrs. Hilburn and child against the electric company under the conventional subrogation.

In our former opinion, we found that the electric company was at fault, and was liable in damages for the death of Mr. Hilburn. We adhere to that finding.

Defendant, in a supplemental brief, argues an exception of no cause of action which is said to have been overruled by the trial judge, and which was not argued or argued in this court on the original hearing or orally on the rehearing. One exception of no cause of action was disposed of in 140 La. 1078, 74 South, 559.

The exception is stated to have been based on section 34 of the Employers' Liability Act, which declares:

"That the rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, relations, or otherwise, on account of such injury."

This limitation of the right of action by an employee and his dependents is against his employer, or the insurer of the employer, or the employer of an employer. It is a part of the "Employers' Liability Act," which prescribes for "the liability of an employer to make compensation for injuries received by an employee in performing services arising out of and incidental to his employment." The act does not embrace or refer to the liability of others than employers for damages suffered by or through the fault of third persons. The act is restricted to contracts between employers and employees and to compensation by employers to employees for injuries suffered in performing services arising out of or incidental to their employment.

Section 7 of the act recognizes the right of the person injured to obtain compensation from his employer and to proceed at law for damages from third persons for his injuries; and, in the event that the injured person has recovered compensation from his employer and damages from a third person, the employer becomes subrogated to the rights of the injured party against said third person to the extent of the compensation made by the employer.

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The right of the employee to compensation from his employer for personal injuries does not exclude the right of an injured person to recover damages from third persons through whose fault the damage happened.

The cases of Veasy v. Peters, 142 La. 1012, 77 South, 948, Dupre v. Coleman, 143 La. 69, 78 South. 241, Boyer v. Crescent Factory, 143 La. 368, 78 South. 596, and Philps v. Guy Drilling Co., 143 La. 951, 78 South. 549, were all cases between employees and their employers; and what may have been said therein had reference to rights of action by employees against their employers, and not against third persons for damages. The exception was properly overruled.

The judgment appealed from is affirmed with costs.

Provosty, J., dissents, adhering to original opinion.
O'Niell, J., concurs in the decree.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

LONDON GUARANTEE & ACCIDENT CO., LIMITED,

v.

STERLING (two cases).*

STERLING

v.

LONDON GUARANTEE & ACCIDENT CO., LIMITED (two cases).*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEDURE—EQUITY PRACTICE.

The procedure under the Workmen's Compensation Act is governed by the pactice in equity.

(For other cases, see Master and Servant, Dec. Dig. § 394.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—VACATION OF JUDGMENT—EQUITY PRACTICE.

The right created by Rev. Laws, c. 193, §§ 15–19, to have final judgments in civil actions vacated in practice is limited to proceedings in courts of law under the forms of the common law, and does not extend to proceedings under the Workmen's Compensation Act, which are governed by the practice in equity.

(For other cases, see Master and Servant, Dec. Dig. § 418[1].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION AGREEMENT WITH INSURER—EFFECT.

Agreement between an insurer and the widows of deceased employees by which the insurer undertakes to pay compensation under the Workmen's Compensation Act is not an admission of any common-law

*Decision rendered, Sept. 11, 1919. 124 N. E. Rep. 286.

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or statutory liability for conscious pain, suffering, and death, and the amount agreed to be paid is not an adjustment, settlement, or compromise of a claim for damages grounded on causes of action outside the scope of the act.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT — COMPENSATION AGREEMENT — APPROVAL BY BOARD AND COURT—JURISDICTION.

The jurisdiction of the Industrial Accident Board under Workmen's Compensation Act, pt. 3, § 4, to approve agreement regarding compensation, and the jurisdiction of the superior court under part 3, § 11, as amended by St. 1912, c. 571, § 14, to render decree in accordance with agreements approved by the board, necessarily rests upon an assumption, and the fact that the agreement concerns a compensation for injuries sustained by an employee protected by the act, and then only when the terms of the agreement conform to its provisions.

(For other cases, see Master and Servant, Dec. Dig. § 396.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AGREEMENT FOR COMPENSATION—APPROVAL BY COURT.

The superior court by its decree cannot give validity to an agreement for compensation between claimant and a compensation insurer, void in its inception because not approved by the Industrial Accident Board acting pursuant to the authority conferred upon it by Workmen's Compensation Act, pt. 3, § 4.

(For other cases, see Master and Servant, Dec. Dig. § 396.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION AGREEMENT—APPROVAL BY BOARD.

An agreement for compensation between a workmen's compensation insurer and a claimant for compensation is not approved unless the formal approval by the Industrial Accident Board is also a legal approval, and within the jurisdiction conferred on the board by the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION AGREEMENT—APPROVAL—JURISDICTION OF COURT.

Full performance of the conditions of its act in approving the action of the Industrial Accident Board in confirming an agreement for compensation between claimant and a workmen's compensation insurer is an essential prerequisite to the jurisdiction of the superior court, and its authority and the statutory limitation on its exercise cannot be enlarged, diminished, or destroyed by express consent, or waived by acts of estoppel.

(For other cases, see Master and Servant, Dec. Dig. § 396.)

8. ADMIRALTY—WORKMEN'S COMPENSATION ACT—APPLICABILITY—MARITIME INJURIES.

Where two carpenters were killed while working in the hold of a vessel, a maritime employment, the cases did not come within the Workmen's Compensation Act, and the superior court in approving compensation agreements between the widows and the compensation insurer was without jurisdiction, and void.

(For other cases, see Admiralty, Dec. Dig. § 21).

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Appeals from Superior Court, Suffolk County.

Proceedings by Rena Sterling and another under the Workmen's Compensation Act, for compensation for death of their husbands, opposed by T. Owen Tully, the employer, and the London Guarantee & Accident Company, Limited, the insurer. Agreements for compensation were approved by the Industrial Accident Board, but the insurer discontinued payments, and the widows petitioned for decrees on the agreements, which petitions were allowed, and from the decrees the insurer appealed ineffectually, petitioning to vacate the decrees and suing to enjoin their enforcement, also petitioning for leave to file bill of review. Decrees in accordance with the opinion, dismissing the bills for injunctive relief. directed.

H. S. Avery, of Boston, for insurer.
William N. Osgood, of Boston, for Rena E. and Maud M. Sterling.

PIERCE, J. Prior to November 2, 1916, the London Guarantee and Accident Co., Ltd., issued to one T. Owen Tully a policy of insurance under the Workmen's Compensation Act (St. 1911, c. 751) to cover a period from January 3, 1916, to January 3, 1917, November 2, 1916. William Sterling, the deceased husband of Rena E. Sterling, and William L. Sterling, the deceased husband of Maud M. Sterling, employees of the said T. Owen Tully, a carpenter contractor, in the course of their employment while engaged in installing shifting boards on the steamship Devonian while the steamship was lying at the wharf in Boston Harbor, at Boston, upon navigable water, came to their deaths through exposure to fumigating gas used on the steamship for the purpose of exterminating rats and vermin prior to the loading of the ship.

At some time before March 21, 1917 the insurance company and the two widows came to an agreement by which the insurance company agreed to pay to each $10.00 weekly for a period of four hundred weeks, begining with November 2, 1916. In accordance with St. 1911, c. 751, pt. 3, § 4, and amendments thereof, these agreements were signed and filed with the Industrial Accident Board on March 21, 1917. They were approved by that board on April 20 and 26, 1917. The insurance company made the agreed compensation payments as they became due up to August 8, 1917, when it learned that the United States Supreme Court in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, in May, 1917, had decided that it was beyond the power of the several states to enact a workmen's compensation act applicable to injuries occuring upon navigable waters. Thereupon the insurance company stopped making payments under the agreements and have made no further payments thereon. The widows and their representatives were advised by the insurance company as to the reasons why the payments were discontinued. Subsequently each of the widows brought proceedings under part 3, § 11, in the superior court for a decree on the agreement. After due hearing and in accordance with the statute the petitions of the widows were allowed. Decrees based upon the memoranda of agreement were made on September 5, 1917, and the insurer appealed therefrom. The act makes no provision for appeal from a decree of the superior court, such as was here entered. Dempsey's Case, 230 Mass. 583, 120 N. E. 75.

[1, 2] October 1, 1917, the insurance company filed petition and amended petitions in each case to vacate the decrees; it also filed motions in each case to vacate the decrees. These petitions and motions after hearing were severally denied on March 16 and April 18, 1918, and the insurance company in each case severally appealed. It is plain the petitions and motions to vacate the decrees were denied rightly. The procedure under the Compensation Act is governed by the practice in equity

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Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914B, 372. The right first created by St. 1875, c. 33, now R. L. c. 193, §§ 15, 16, 17, and 18 19, to have final judgments in civil actions reviewed and vacated in practice is limited to proceedings in courts of law under the forms of the common law as distinguished from suits in equity and criminal prosecutions.

May 2, 1918, the insurance company filed a petition in each case with the Industrial Accident Board, in which it prayed "that the agreement entered into by the insurer with the widow of the deceased employee be modified and annulled and that the insurer be forthwith released from the payment of any further compensation by the said Industrial Accident Board"; and it asked for this relief on the ground that "the agreement entered into by the insurer with the dependent was made by mistake of fact and through a misunderstanding as to the meaning of the law." May 14, 1918, the Industrial Accident Board, after hearing, entered the decision "The above petition is denied." May 21, 1918, the insurance company presented to the superior court certified copies of the decisions and prayed "that review of said decision be made and a decree entered thereon in accordance with the law and the facts." September 12, 1918, the cases came on for hearing and it was decreed in each "that the order of the Industrial Accident Board denying the insurer's petition be affirmed." September 13, 1918, the insurance company appealed from the decrees entered in the above cases.

[3-8] "The Industrial Accident Board is not a court of general or limited common law jurisdiction; * * * it is purely and solely an administrative tribunal, specifically created to administer the Workmen's Compensation Act in aid and with the assistance of the superior court. * * * [It] possesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers." Levangie's Case, 228 Mass. 213, 216, 117 N. E. 200, 201. The agreement between the insurance company and the widows was an undertaking to pay compensation under the act. It was not an admission of any common law or statutory liability under a claim for damages resulting to the claimants because of the conscious pain, suffering and death of their husbands, the employees, and the amount agreed to be paid was not an adjustment, settlement or compromise of an admitted or disputed claim for damages grounded on causes of action outside the scope of the compensation Act. The jurisdiction of the Industrial Accident Board under part 3, § 4, to approve agreements regarding compensation, and the jurisdiction of the superior court under part 3, § 11, as amended by St. 1912, c. 571, § 14, to render a decree in accordance with the agreement approved by the Industrial Accident Board, necessarily rest upon an assumption and the fact that the agreement concerns a compensation for injuries sustained by an employee protected by the act, and then only when the terms of the agreement "conform to the provisions of this act." It is fundamental that the superior court could not by its decree give validity to an agreement of compensation in its inception void because not approved by the Industrial Accident Board acting within and under the authority conferred upon it by part 3, § 4, of the act. And of course the agreement is not approved unless the formal approval be also a legal approval and within the jurisdiction conferred on the Industrial Accident Board by the act. It is to be said of the decree of the superior court as was said in Levangie's Case, supra, of the action of the Industrial Accident Board:

"It follows that full performance of the conditions of the act are essential prerequisites to the jurisdiction of the board [court], and that its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waived by acts of estoppel." "Consent cannot give jurisdiction where the law has not

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given it." Jordan v. Dennis, 7 Metc. 590; Gilman v. Thompson, 11 Vt. 643, 647, 34 Am. Dec. 714.

The action of the Industrial Accident Board and of the superior court was without jurisdiction, was a nullity and void, but the validiy of the order and decree cannot be questioned on appeal for the reasons stated in Dempsey's Case, supra. September 6, 1918, the insurance company filed petitions for leave to file a bill of review in each case. These petitions were allowed and bills of review were filed September 13, 1918. October 16, 1918, decrees were entered dismissing the bills of review, and the petitioner appealed.

The fact that the injuries to which the agreements of compensation relate were maritime in their nature and hence not within the scope of the Workmen's Compensation Act under the Jensen decision, supra, was apparent on the record when presented to the superior court, and also when "in accordance to said agreement" on September 5, 1917, the superior court "decreed that the said * * * insurer * * * pay * * * ten dollars weekly for a period of four hundred weeks from November 2, 1916." In the opinion of a majority of the court it follows that the decree of September 5, 1917, was void for want of jurisdiction and must be vacated for error on the face of the decree.. Clapp v. Thaxter, 7 Gray, 384, 386; Sawyer v. Davis, 136 Mass. 239, 247, 49 Am. Rep. 27.

September 6, 1918, the insurance company brought bills in equity to enjoin the two widows from enforcing the decrees of September 5, 1917. Answers were filed and the cases were set down for hearing on bill and answer. After hearing and argument of counsel, each bill was dismissed, and the petitioner appealed. As the decree of September 5, 1917, must be vacated for error on the face of the decree, it is unnecessary to decide whether the petitioner is entitled to injunctive relief. See Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Palmer v. Lavers, 218 Mass. 286, 105 N. E. 1000; Currier v. Esty, 110 Mass. 536; Amherst College v. Allen, 165 Mass. 178, 42 N. E. 570. These bills must be dismissed without prejudice and without costs.

Decrees accordingly.

SUPREME COURT OF MINNESOTA.

STATE EX REL. MELROSE GRANITE CO. ET AL.

v.

DISTRICT COURT, SEVENTH JUDICIAL DIST. ET AL.

ZINKEN

v.

MELROSE GRANITE CO. ET AL. (No. 21193.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW—QUESTIONS OF FACT.

A finding that lime was splashed into the eyes of a stone mason by

*Decision rendered, Aug. 8, 1919. 173 N. W .Rep. 857. Syllabus by the Court.

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a fellow workman and that both eyes were injured is sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 412.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EFFECT OF RELEASE.

A settlement made by the workman with his employer and the insurer of the employer on the mutual assumption that he was entitled to compensation for the loss of one eye only, and a release executed on the same assumption, do not bar him from thereafter claiming compensation for the injury to the other eye.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

3. MASTER AND SERVANT—PARTIAL DISABILITY—TOTAL DISABILITY.

A workman's left eye had been injured so that one-half of his ability to see with it was lost. Thereafter, in the course of his employment, both eyes were injured, the right so badly that it became necessary to remove it, and the left to such an extent that, although he is not totally blind, he can no longer follow any occupation. *Held,* that he is entitled to the compensation for permanent partial disability which is fixed by the schedule found in section 4, c. 209, G. L. 1915 (Gen. St. Supp. 1917, § 8207), that the amount of compensation is not determined by the clause in the schedule covering the loss of one eye, but by the clause which provides that the compensation shall be 50 per cent. of the difference between the wage of the workman at the time of his injuty and the wage he is able to earn in his partially disabled condition for a period not exceeding 300 weeks.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

Certiorari from District Court, Stearns County; John A. Roeser, Judge.

Proceedings under Workmen's Compensation Act by W. Zinken, employee, opposed by the Melrose Granite Company, employer, and Travelers' Insurance Company, insurer, to recover for personal injuries. Compensation was awarded the employee, and the State, on relation of the employer and insurer, brings certiorari. Affirmed.

J. D. Sullivan, of St. Cloud, and L. N. Foster, of Minneapolis, for appellants.

Paul Ahles, of St. Cloud, for respondent.

LEES, C. This was a proceeding under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230), in which Zinken, an employee of the Melrose Granite Company, was awarded compensation, and his employer and its insurer, the Travelers' Insurance Company, by writ of certiorari, bring here for review the judgment entered for the amount awarded.

Zinken was a stone mason employed on July 20, 1915, by the granite company in laying the foundation walls of a building it was erecting. Mortar was brought to him by a fellow workman whose duty it was to deposit it on a mortar board. In doing so he carelessly splashed some of the mortar into Zinken's face and eyes, and the lime burned his right eye so badly that it became necessary to remove it, and also injured his left eye as hereafter stated. Several years before Zinken's left eye had been struck with a hammer and quite seriously injured. It healed, but the pupil was elongated, there was some adhesion of the iris to the cornea, and the eye lacked the power of accommodation. In consequence of this injury, it had lost one-half of its normal power of vision. Zinken's wages

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were $24.30 per week. The accident totally disabled him from hereafter earning any wages. $1,100 was paid him in installments of $22 each, pursuant to an agreement for a settlement executed in August, 1915. On June 16, 1917, when the final installment was paid, he executed a release of all further claims he might have against his employer and the insurance company. In July, 1918, he commenced this proceeding. The trial court found that his left eye, as well as the right, was burned by the lime, and that the scar tissue over the cornea was thereby enlarged to such an extent that he had lost all practical vision, being only able to have light perception through a small section of the cornea. It was found that he was entitled to receive $3,300 total compensation, less $1,100 which had been paid, and that the release given in consideration of the payment of the latter amount was not binding upon him, for the reason that he signed it because he was told and believed that it was a receipt like the other receipts he had signed as the several installments were paid.

As presented in argument, the questions are: (1) Was the court justified in finding that lime was splashed in Zinken's left eye? (2) Was it justified in disregarding the settlement and release? (3) If both questions are answered in the affirmative, was the correct amount awarded as compensation?

[1] 1. No useful purpose would be served by a review of the evidence bearing on the question of whether lime was or was not splashed in Zinken's left eye. His own testimony, if credited, would support a finding that it was. The testimony of Dr. Whiting to the contrary is quite persuasive. There might have been a finding either way; hence we are not required to hold that the finding in his favor is manifestly against the clear preponderance of the evidence, and it cannot be disturbed. State ex rel. Adriatic M. Co. v. District Court, 137 Minn. 435, 163 N. W. 755, L. R. A. 1917F, 1094.

[2] 2. Zinken testified that Dr. Whiting, who was employed by the insurance company to attend him, told him, after removing his right eye, that he would be paid $11 per week for 100 weeks, that this was the amount allowed by law for the loss of one eye, and that in a short time he would be able to use his left eye as well as ever. Compensation was agreed upon on that basis, and payments were made at intervals of two weeks. He was required to sign a receipt for each installment when it was paid. When he received the last installment, his employer's bookkeeper told him to sign a paper, saying it was the same as those he had signed before. This paper was the release already referred to. Dr. Whiting testified that he told Zinker not to go to the expense of employing a lawyer, because the law provided a maximum of $1,100 for the loss of an eye, and that the insurance company would pay him this amount voluntarily. There was no other testimony relating to the signing of the agreement for settlement or the release. It is apparent that both parties acted throughout on the assumption that Zinken was legally entitled to receive compensation only for the loss of his right eye. There was no pretense of compensation for the injury to the left eye. Under these circumstances we think the court was clearly right in holding that neither the agreement for a settlement nor the release, barred Zinken from asserting his present claim.

[3] 3. The amount of compensation to which Zinken was entitled must be ascertained by referring to the following provisions of the Compensation Act:

G. S. 1913, § 8209, reading as follows:

"If an employee receive an injury, which, of itself, would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

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And parts of section 4, c. 209, G. L. 1915 (Gen. St. Supp. 1917, § 8207), reading as follows:

"(c) For permanent partial disability, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit: * * *

"For the loss of an eye, sixty per centum of daily wages during one hundred (100) weeks. * * *

"In all other cases of permanent partial disability not above enumerated, the compensation shall be sixty per centum of the difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition, subject to a maximum of $12.00 per week. Compensation shall continue during disability, not, however, beyond 300 weeks."

Clause (e) of the schedule provides that the total and permanent loss of the sight of both eyes shall constitute permanent total disability for which compensation shall be paid for a period of 400 weeks.

It was contended in Zinken's behalf, and the court found, that his is a case of permanent partial disability, entitling him to compensation at the rate of $11 per week for 300 weeks. The opposing contention is that, at most, he was entitled to $11 per week for 100 weeks for the loss of his right eye and to $5.50 per week for the same period for the injury to his left eye. Section 8209, G. S. 1913, as construed in State ex rel. Garwin v. District Court of Cass County, 129 Minn. 156, 151 N. W. 910, is relied upon as support for this contention. In the Garwin Case the workman was blind in one eye and lost the other while engaged in performing the duties of his employment. It was held that he was entitled to receive 50 per cent. of his wages for 100 weeks, the amount specifically fixed by the schedule for the loss of one eye. He was compensated on the same basis as though he had been possessed of two normal eyes at the time of the injury and had lost one of them. The explicit provision of the statute led inevitably to the conclusion reached in that case. But this povision does not fit the case of a workman whose injury destroyed one eye and half of the sight of the other. Under the ruling in the Garwin Case, a workman who comes within the scope of section 8209 cannot claim the compensation which is secured to one who has been permanently and totally disabled, but is only entitled to compensation for permanent partial disability. We are now asked to construe the statute to mean that a workman's eyes are to be valued separately—a good eye, in the case of a man earning the wage of Zinken, at $1,100, and an eye which is only 50 per cent. efficient at $550. It would be both narrow and illiberal so to construe it, whereas we have consistently held that it is to be liberally construed in favor of workmen. Supp. Dun. Dig. § 5854b; State ex rel. Tinglestad v. Nye, 136 Minn. 50, 161 N. W. 224. Zinken had one perfect and one imperfect eye. Mortar was thrown in both of them and both were burned. At the time when his eyes were thus injured, his eyesight, by reason of the previous injury to his left eye, was a fourth less than normal. His employer is required to compensate him only for the disability caused by the loss of three-fourths of his eyesight, without reference to the fact that he is now practically deprived of all power of sight, as a consequence of his previous injury combined with the injury for which his employer is responsible.

Clause (e) of the schedule does not apply, for he has not suffered a total loss of the sight of both eyes as a result of the injury sustained while in the service of his employer.

In fact, he is not blind; for, according to the findings, he is still "able to have light perception and get some slight glimpses through a small section of the upper part of the cornea," but he can no longer see sufficiently to do any kind of work.

His employer is liable for compensation for the permanent partial

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disability suffered by Zinken, and the court so finds. It is also found that the extent of such disability is equivalent to "75 per cent. of the loss of both eyes."

The precise question is this: On what basis is an injured workman's compensation to be determined, when his employer is required to compensate him for the loss of 75 per cent. of the normal power of vision?

Such loss must of necessity be occasioned by an injury to both eyes which may not wholly destroy either of them, or may destroy one and reduce the sight of the other one-half as was the case here.

On the theory of the petitioner, the basis would be compensation for 100 weeks for the lost eye and for 50 weeks for the other. But on the same theory, if one eye were destroyed and the other deprived of ninety-nine one-hundredths of its power of vision, compensation would be made for but 199 weeks, although the workman would be practically blind, and, as we have already pointed out, for the total loss of sight the statute provides for compensation for 400 weeks. In many cases the adoption of the theory advanced would lead to results which were manifestly not intended by the Legislature.

Attention is called to the clause in the schedule relating to permanent partial disability due to injury to a member resulting in less than total loss of such member, which is said to lend support to the theory of the petitioner.

[4] In common usage the term "member" as applied to the human body means the extremities of the body, and particularly the arms and legs. See Century Dict. under "Member."

But if the term as used in the statute is to be taken to mean an eye as well as a hand or foot, the result of the adoption of petitioner's theory would be the same in the cases above referred to for the purpose of illustration.

We conclude, therefore, that compensation in such a case as we have here is not to be made on the basis suggested, but rather under the clause of the schedule which governs in all cases of permanent partial disability not specifically enumerated in the schedule. Zinken is entitled to 50 per cent. of the difference between his wages when injured and the wages he is able to earn in his partially disabled condition, subject to a maximum of $11 per week for not more than 300 weeks.

He has been wholly unable to earn any wages since he was injured; hence he is entitled to $3,300, less $1,100 already paid.

The trial court correctly awarded him $2,200, and its judgment is hereby affirmed.

SUPREME COURT OF NEBRASKA.

UNITED STATES FIDELITY & GUARANTY CO. ET AL.

v.

WICKLINE. (No. 21010.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DENIAL OF RECOVERY.

When a woman employee who has suffered an injury to one of her kidneys offers to permit an X-ray photograph of the kidney to be made, but refuses to permit the injection of colorogol into the kidney for the

*Decision rendered, July 16, 1919. 173 N. W. Rep. 689. Syllabus by the Court.

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purpose of rendering it opaque, she does not necessarily, by such refusal, forfeit her right to compensation under the Employers' Liability Act (Rev. St. 1913, §§ 3642-3696).

(For other cases, see Master and Servant, Dec. Dig. § 399.)

3. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

In an appeal under the Employers' Liability Act from an award of the compensation commissioner the district court has authority to hear the cause as a suit in equity and to enter final judgment therein. Rev. St. 1913, § 3678.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

4. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—AWARD.

Where an appeal is taken from an award of the compensation commissioner under the Employers' Liability Act, the district court, on proper application, should allow such additional compensation and "waiting time" as the evidence shows the employee entitled to by reason of continuing disability subsequent to the award of the commissioner.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from District Court, Lancaster County; Shepherd, Judge.

From award of the compensation commissioner to Emma Wickline, the United States Fidelity & Guaranty Company and another appealed to the district court. From a judgment there for claimant respondents appeal, and claimant cross-appeals. Modified and affirmed.

See, also, 103 Neb.——, 170 N. W. 193.

Strode & Beghtol, of Lincoln, for appellants.

R. J. Greene, of Lincoln, for appellee.

MORRISSEY, C. J. This cause is here for the second time. It is first reported in United States Fidelity & Guaranty Co. v. Wickline, 103 Neb. —, 170 N. W. 193. A second trial has been had, and from the judgment entered both parties appeal.

It is said in the brief of plaintiff that—

"The sole issue in the case is whether or not Mrs. Wickline, by refusing to submit to a medical examination, including the taking of an X-ray picture, brought herself within the provisions of section 3675, Rev. St. 1913, which provides that refusal to submit to a medical examination shall bar the right to compensation."

We shall dispose of this question before taking up the questions raised in the cross-appeal.

[1] Defendant's physician testified that she "thought an X-ray picture was a reasonable and a necessary thing," and that she had so advised defendant. A physician skilled in the art of making and reading X-ray photographs testified that in order to properly determine the extent and character of defendant's injury an X-ray photograph of the kidney ought to be made. He stated that in order to make a proper photograph it might be necessary to inject into the kidney an opaque solution called "colorgol," and described in detail the method of making his injection, stating:

"In the hands of an expert there is no danger whatever."

He further testified:

"That is a procedure that is not used so extensively as formerly be-

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cause we are now able to X-ray the kidney without difficulty without injecting it."

He explained that he found it necessary to use this solution in a few cases. Defendant testified that if the court called upon her to have an X-ray picture taken, she would permit that to be done, but she would refuse to have colorogol injected into her kidney.

The district court found that the demand upon her was not reasonable, and that her refusal ought not to bar from a recovery. It further found that there was due defendant from plaintiff $81 for compensation and waiting time from the time plaintiff ceased its payments to the date of the award made by the compensation commissioner with interest and costs.

In our former opinion it is said:

"In the present advanced state of the science of X-ray examinations and X-ray photographs of the person there appears to be no reason why such examination or photograph should not be permitted by a claimant for compensation under the Employers' Liability Act, upon request by the employer or insurer, unless the request is shown to be unreasonable."

The district court was therefore required to determine whether under the circumstances the request in this cse was reasonable. It will be seen from the testimony of the expert produced by plaintiff that it is only in rare instances that it is necessary to inject this substance into the kidney, and it would seem that plaintiff ought to have availed itself of defendant's offer to submit to an X-ray examination without this injection. It may be that an injection was not necessary. We are constrained to hold, with the trial court, that the demand upon Mrs. Wickline was not reasonable.

[2] By cross-appeal, counsel for defendant again asks us to tax an attorney fee against plaintiff. In the former opinion it was properly held that an attorney fee could not be taxed as part of the costs, and that holding is the law of the case. The statute was amended by the Legislature of 1919 (Laws 1919, c. 103), but the amendment is not applicable to this case.

[3, 4] It is urged that the judgment ought to be for compensation and waiting time down to the date of the judgment in the district court, rather than to the date of entering the order by the compensation commissioner. Section 3678, Rev. St. 1913, as amended by chapter 85, § 13, Laws 1917, provides that—

"All disputed claims for compensation * * * must be submitted to the compensation commissioner for an award," but "if either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court * * * which court shall have authority to hear and determine the cause as a suit in equity and enter final judgment therein."

Under this provision of the statute and the evidence adduced, the district court ought to have made a determination of the rights and claims of the parties down to the date of trial. Mrs. Wickline's undisputed testimony, as well as that of her husband shows she was still disabled, as a result of the injury, at the time of the hearing in district court. She was entitled to 40 weeks' compensation at $6 a week, and waiting time in addition to that awarded her.

The judgment of the district court is modified by adding to it the amount of $360, compensation and waiting time to the date of trial in that court, and, as thus modified, is affirmed.

Modified and affirmed.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

ELDRIDGE

v.

ENDICOTT, JOHNSON & CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW —"INJURY ARISING IN COURSE OF EMPLOYMENT"—ANTHRAX.

Where a servant's neck was slightly cut while being shaved at a barber shop, and on the following day, while working in a tannery handling hides, symptoms of anthrax first appeared his death from the disease was due to accidental injury "arising in the course of his employment."

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.

Woodward and Henry T. Kellogg, JJ., dissenting.

Appeal from award of State Industrial Commission.

Application by Mrs. G. J. Eldridge for compensation for herself and children on account of the death of her husband, William Eldridge, opposed by Endicott, Johnson & Co., employer, and the Employers' Liability Assurance Corporation, insurer. From an award of the State Industrial Commission in favor of the claimant, the employer and the insurer appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

L. M. Twining, of Binghamton (John Marcy, Jr., of Binghamton, of counsel), for respondents.

Charles D. Newton, Atty. Gen., Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

LYON, J. The commission has found that on November 16, 1915, while being shaved at a public barber shop, the neck of William Eldridge was slightly cut with a razor; that on the following day, when the symptoms of anthrax first appeared, he was working in the tannery of his employers, Endicott, Johnson & Co., handling hides; that the reasonable inference is that he contracted anthrax in the course of his employment; and that he died as a result of said anthrax on November 20th. The commission has also found that the contracting of anthrax, consisting of the bite of the bacillus of anthrax, was an accidental injury within the meaning of the Compensation Law, and that said injury arose out of and in the course of his employment. Upon the hearing before the deputy commissioner, the only question litigated was whether the in-

*Decision rendered, September 18, 1919. 177 N. Y. Supp. 863.

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jury was an accidental injury; the attorney for the insurance company stating: "It is supposed that he got the anthrax germ at his work." In the opinion written in the case, the commissioner says:

"I think it is fair to assume that he contracted anthrax in the course of his employment, and the question is: Can his death, under the circumstances, be attributed to an accidental injury arising out of and in the course of his employment?"

The opinion is based upon the case of Bacon v. United States Mutual Accident Association, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748; two judges dissenting. As was said by Justice Cochrane in the case of Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. Supp. 767, commentng upon the Bacon Case:

"That case was decided with reference to the particular provision and phraseology of the policy then under consideration, and it is quite clear that it constitutes no precedent under the statute we are now called upon to apply."

In the case of Hiers v. Hull & Co., supra, it was held that an employe, injured while handling diseased hides became infected with anthrax germs through an abrasion in his hands previously sustained, met with an accidental injury within the meaning of the Compensation Law.

In Hart v. Wilson, 186 App. Div. 926, 172 N. Y. Supp. 896 (affirmed 227 N. Y.—, 124 N. E. —), in which Hart died of tetanus, the commission found that the contraction of tetanus, consisted of the bite of the bacillus of tetanus, which was undoubtedly in the wool, was an accidental injury within the meaning of the Compensation Law. No opinion was written in this court or in the Court of Appeals in this case. This case makes it unnecessary to discuss the case of Richardson v. Greenberg, 188 App. Div. 248, 176 N. Y. Supp. 651.

In Higgins v. Campbell & Harrison, Limited, 6 W. C. C. 1, a workman who had a pimple on his neck was employed in a wool-combing factory. It was his duty to bring bales of wool to the factory and take them to the machine to be washed. In doing this he had to pass some bales of Persian wool, and in the course of his employment he contracted anthrax. Held that he was entitled to compensation.

In Brintons, Limited, v. Turvey, 7 W. C. C. 1, the applicant's husband was employed in the appellant's factory as a wool sorter. He became infected with anthrax from wool which it was his business to sort. An operation became necessary and resulted in his death. Held, by the House of Lords, that the contraction of anthrax was an accident.

In Lewis v. Ocean Accident & Guarantee Corp., 224 N. Y. 18, 120 N. E. 56, there was little doubt that the germ causing the death came from an infected pimple. It was held that if the pimple had been punctured by some instrument, and the result of the puncture was an infection of the tissues, then there was an accident, and the defendant was liable.

In Horrigan v. Post Standard Co., 224 N. Y. 620, 121 N. E. 872, where decedent cut his finger at home, and while engaged in cleaning a urinal, put his injured hand into the water, producing an infection which caused his death, it was held that his death was the result of an accident, and that the applicant was entitled to compensation.

In Plass v. Central New England Railway Co., 169 App. Div. 826, 155 N. Y. Supp. 854, Plass was engaged in cutting weeds along the railway right of way, and came in contact with poison ivy, whch resulted in his sickness, reducing his power of resistance, and while in bed he contracted bronchitis, which developed oedema of the lungs, and he died quite suddenly, it was held that his widow was entitled to compensation.

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The commission has found that this claim falls within the principle of Horrigan v. Post Standard Co., and of Hiers v. Hull & Co.

The award should be affirmed. All concur, except Woodward and Henry T. Kellogg, JJ., who dissent

SUPREME COURT OF NEW YORK.

SPECIAL TERM, NEW YORK COUNTY.

MORRIS.

v.

MULDOON.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACT—PLEADING—REPLY.

In an action by a servant for injures, reply of plaintiff *held* to put in issue defendant's allegation that he had complied with the Workmen's Compensation Act, although reply met the defendant's allegation in one place with a denial of "knowledge or information" respecting same.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

3 MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—APPLICATION.

In determining whether an injured servant should have proceeded in an action for negligence, or under the Workmen's Compensation Law. the law in force at the time of the accident governs.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—APPLICATION.

Where a servant was injured before the amendment of the Workmen's Compensation Law in 1916, in order to bring the matter within the provisions of such law, it was necessary that the employer was conducting a hazardous employment, that the employe was injured while engaged in one of the hazardous employments enumerated in such law, that the employe was at the time employed to do work in the line of the employer's regular business, and that the employe was engaged in the regular work he was employed to do.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—REGULAR EMPLOYMENT OF EMPLOYE.

Prior to amendment of the Workmen's Compensation Law in 1916, in order to bring the work an employe was doing at the time an accident happened within his regular employment, it is necessary that it appear that he was doing the work he was employed to perform, and that it was a natural incident of employer's regular work or occupation.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

*Decision rendered, July 28, 1919. 177 N. Y. Supp. 673.

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6. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"EMPLOYMENT."

The term "employment," as used in the Workmen's Compensation Law prior to its amendment in 1916, denoted employment only in a trade, business, or occupation carried on by the employer.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Employment.

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"MASON OR CONCRETE WORK."

Excavating work under a foundation wall done for the purpose of building a pier thereunder cannot be deemed any part of "mason or concrete work" within the meaning of Workmen's Compensation Law, § 2, group 42, and such law did not apply prior to the amendment in 1916, where a servant of one engaged in "mason, concrete work and sidewalk laying," etc., was injured while making such an excavation.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—APPLICATION—PLEADING.

In an action by a servant for personal injuries received before the Workmen's Compensation Law was amended in 1916, it was not necesary to allege affirmatively in complaint that defendant failed to secure payment of compensation for his injured employes, where case pleaded by the complaint did not appear to come within the statute.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Action by Edward Morris against Edward H. Muldoon. Motion by defendant for judgment on the pleadings. Motion denied.

Nadal, Jones & Mowton, of New York City (Edwin A. James, of New York City, of counsel), for the motion.

George B. Class, of New York City, opposed.

GIEGERICH, J. The defendant moves for judgment on the pleadings, consisting of the complaint, answer, and reply in a common-law action brought by the plaintiff to recover damages for personal injuries sustained on June 30, 1915. The complaint alleges, among other things, that at the time above mentioned the defendant was "engaged in the business of a mason and builder, putting down concrete sidewalks, etc., with a principal office for the tansaction of business at No. 985 Sixth avenue, in the borough of Manhattan, New York City, N. Y.," and the plaintiff was in the employ of the defendant as a common laborer, and was working at No. 7 Division Street, borough of Manhattan, New York City; that in the process of the work performed by the plaintiff the defendant employed no superintendent, foreman or overseer, but personally superintended and directed all of the work; that he was personally directed by the defendant to dig a trench 4 feet square and 10 feet deep in the rear of No. 7. Division Street, at the corner of the extension to No. 5 Division street, and in such a manner that the trench would occupy 20 inches under the foundation supporting the said corner; that the trench was dug to enable the defendant to build under said corner a supporting pier or column of masonry which, with other piers similarly constructed at intervails along said wall, would serve as sufficient support during the process of excavation beside said wall to a depth lower than said wall; that prior to the digging of the trench by the plaintiff the defendant had personally directed the shoring up of said wall by means

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of the insertion of the upper part of a foot square wooden beam into a hole in the wall of No. 7 Division street at a point 9 feet above the level of the ground, and directly above the place where the plaintiff was directed to dig the trench, the other end of the beam resting in the ground; that the defendant furnished no material for supporting the part of said wall, or for shoring or for sheathing and jackscewing the walls of the trench or for any other purpose; that the plaintiff never before had dug any trenches, and was wholly ignorant of the manner in which the walls should be shored up or otherwise supported during the process of excavations thereunder; that when the defendant directed the plaintiff to dig the trench no word or warning or of instruction was given him concerning any possible danger involved; that while in the act of carefully digging at the bottom of such trench, and when he had dug to a depth of 9 feet, without any warning the brick and stone foundation of No. 5 Division street, above the plaintiff, from a point below the place of support, fell upon the plaintiff in the trench below, carrying the earth from the sides of the trench with it, and that by reason of the accident he sustained the injuries set forth, and for which he seeks damages in this action. The answer puts in issue the allegations of negligence on the part of the defendant, and for a further and separate defense pleads in bar to a recovery herein that prior to the accident he had fully and completely complied with the Workmen's Compensation Law (Consol. Laws, c. 67), by securing compensation to employes and their dependents, and futhermore, that he had therefore maintained and posted printed notices regarding compensation, in conformity with the provisions of the said law. The plaintiff by his reply, in the second paragraph hereof, denies, among other things, the allegations of the answer as to maintaining and posting of printed notices regarding compensation, and then, in the same paragraph, denies having any knowledge or information sufficient to form a belief as to defendant conforming to the requirements of the said law, but pleads the immateriality, the incompetence, and the irrelevancy of such an averment as related to the plaintiff's pleaded cause of action at common law for the reasons stated in such paragraph of the reply. The reply, by conclusion, by the third paragraph, denies each and every allegation contained in paragraph numbered "sixth" of the separate defense set up in the answer.

[1, 3] The defendant insists that the denial by the plaintiff in his reply of any knowledge or information sufficient to form a belief as to defendant's compliance with the provisions of the said law cannot be considered as a denial at all. A sufficient answer to such point is that there is a positive denial in the third paragraph of the reply of the allegations contained in the sixth paragraph of the answer that the defendant had at the times mentioned duly and fully complied with all the provisions of the said law for the securing and paying of compensation to any injured employe of the defendant, which is practically the same allegation as set forth in the fifth paragraph of the answer upon that subject. It should be noted that the paragraphs of the answer above mentioned, viz. the fifth and sixth, are part of and are included in the second separate defense. I am assuming that the allegations of the answer respecting the defendant's alleged compliance with the provisions of the law above mentioned include the maintenance and posting of notices regarding compensation pursuant to section 51 thereof. If it does, then the positive denial in the third paragraph of the reply of all allegations contained in the sixth paragraph, which includes an allegation of the defendant's compliance with said law, fully covers that subject, but, if it does not, then it is covered by the second paragraph of the reply, in which the plaintiff, in reply to paragraph numbered "fifth" in defendant's second separate defense, denies each and every allegation thereof, except that he admits that the injuries sustained did not arise

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from any willful intention to bring them about, and did not result from plaintiff's intoxication. In either event, therefore, the reply puts in issue the maintenance and posting of notices regarding compensation in conformity with section 51 of said law. Even if the allegations of the answer as to compliance with the provisions of the Workmen's Compensation Law had been met only with a denial in the reply of knowledge or information respecting the same, and assuming, as claimed by the defendant, that all the facts relating to such alleged compliance are matters of public record, open to everybody, a motion to strike out the reply under section 538 of the Code of Civil Procedure is the proper method of testing an alleged defect of that description rather than a motion for judgment on the pleadings under section 547. Harley v. Plant, 210 N. Y. 405, 104 N. E. 946. So far as the present motion is concerned, therefore, the averment contained in the separate defenses that the defendant had complied with said law and had maintained and posted printed notices regarding compensation in accordance with its provisions put in issue by the reply. In this situation, the issues so raised have to be disposed of upon the trial, and cannot be summarily disposed of on a motion for judgment on the pleadings. Emanuel v. Walter, 138 App. Div. 818, 123 N. Y. Supp. 491; Simon v. Bierbauer, 154 App. Div. 506, 139 N. Y. Supp 327; Partenfelder v. People, etc., 157 App. Div. 462, 142 N. Y. Supp. 915, Affirmed 211 N. Y. 355, 105 N. E. 675; Guggenheim v. Guggenheim, 95 Misc. Rep. 332, 159 N. Y. Supp. 333; Wilson & Co. v. Hartford Fire Ins. Co., N. Y. Law Journal, June 4, 1919. The defendant, notwithstanding that the allegations of the separate defenses are put in issue, insists that the plaintiff must allege affirmatively in the complaint the failure of the defendant to secure the payment of compensation for his injured employees and their dependents, as provided by section 50 of the Workmen's Compensation Law. It was held by the Appellate Division of this department in Nulle v. Hardman, Peck & Co., 185 App. Div. 351, 173 N. Y. Supp. 236, that where it appeared from the allegations of the complaint that the case came within the provisions of the Workmen's Compensation Law and a recovery outside of its provisions was sought, and there was no allegation of facts showing that the employer had failed to secure compensation, as provided in the said law, the complaint was demurrable. Judge Benedict very recently reached a different conclusion in Basso v. John T. Clark & Son, Inc., 177 N. Y. Supp. 484. In the Nulle Case it clearly appeared from the allegations of the complaint that the deceased was employed in a hazardous employment, within the meaning of the Workmen's Compensation Law, and that the defendant was engaged in a hazardous employment, under the terms of certain provisions of such law. That case, therefore, came within the statute, and the court pointed out that the remedy provided under the act is exclusive where it applies, citing Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795, and that the only exception to this rule would be in case the employer had failed to secure compensation for his injured employees and their dependents as provided in the act, but that this was for the plaintiff to plead, if he seeks a recovery outside the act.

This leads to the consideration of the question whether this case comes within the statute. As already stated, the accident occurred in June, 1915, and it must therefore be decided upon the law as it was in force at that time and irrespective of any amendments thereof which have been made since then. At the time this case arose the Workmen's Compensation Law (Cons. Laws, c. 67, § 3) contained, among others, the following definitions, viz.:

"'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employ-

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ments; but does not include the state and a municipal corporation or other political subdivision thereof." Subdivision 3. "'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants." Subdivision 4. "'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain." Subdivision 5. "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such diseases or infection as may naturally and unavoidably result therefrom." Subdivision 7.

Subdivision 4 was amended by Laws of 1916, c. 622, § 2, as hereinafter stated. Subdivision 5 was amended in certain respects by Laws of 1916, c. 622, § 2, and by Laws of 1917, c. 705, § 2, but as such amendments are unrelated to any of the questions arising upon this motion, it is not deemed necessary to make any statement of them. The court in Matter of Dose v. Moehle Lithographic Co., 221 N. Y. 401, 405, 117 N. E. 616, 617, speaking of subdivision 4 and the amendment thereof, said:

"* * * It is obvious from a comparison of the earlier law with the amended statute, that under the statute before the amendment an employee to be entitled to an award must have been engaged in a hazardous employment in the service of an employer conducting a hazardous employment. Such was the construction of the law in the Bargey Case." 218 N. Y. 410, 113 N. E. 407. "The amendment of 1916 was intended to and does embrace an additional class of employees, viz. those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment."

In Matter of Daly v. Bates & Roberts, 224 N. Y. 126, 127, 120 N. E. 118, 119, the court adopted and followed a previous construction given to subdivision 7 of said section 3 in an earlier case in these words:

"In Matter of Heitz v. Ruppert (218 N. Y. 148, 151 [112 N. E. 750, L. R. A. 1917A, 344]), we sought to establish general principles applicable to a construction of subdivision 7 of section 3 of the Workmen's Compensation Law, a recitation of which will bear repetition here: 'The statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words "arising out of and in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work.'"

[4-7] It will be seen from the foregoing statutory provisions and the decisions rendered thereunder that to bring the case within the Workmen's Compensation Law, as it stood when the accident happened and which, as seen, was before the amendment of the statute in 1916, four things were necessary: (1) That the employer, at the time the employee was injured, be conducting a hazardous employment. Under the state of facts alleged in the complaint there can be no question but that the defendant was at the time when the accident happened conducting a hazardous employment within the meaning of the Workmen's Compensation Law (section 3, subd. 1), being embraced in group 42 as defined in section 2 hereof, as it stood when the plaintiff was injured; "mason work" and "concrete work" being specified in that group (2) That the employe be injured while engaged in one of the hazardous employments enumerated in the different groups of section 2 of said law. The plaintiff was doing excavation work

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when he was injured, which kind of employment comes under group 13 of section 2, as it stood at that time. In order to bring the work the employe was doing at the time the accident happened within his regular employment it must appear under the rule laid down in the Daly Case that he was doing the work he was employed to perform, and that it was a natural incident of such work. It is therefore necessary to show (3) that the employe was at the time he was injured employed to do work in the line of the employe's regular business which, as seen, was that of mason and builder, laying of concrete sidewalks. The complaint in the present case contains no such allegation, nor does it show what the plaintiff's regular employment was. An answer to this (third) proposition is necessary in order to determine, in the absence of other facts, whether or not the work the plaintiff was performing when the accident happened was fairly within the line of the defendant's regular business or as a natural incident thereto. As above shown, the statute does not apply unless the acident arose both out of and in the course of employment. The term "employment" as used in the statute denotes, as above stated, employment only in a trade, business, or occupation carried on by the employer, which, of course, means his regular line of business conducted by him and in the course of which the employe is injured. Matter of Bargey v. Massaro Macaroni Co., 218 N. Y. 410, 113 N. E. 407. The next and remaining prerequisite is (4) That the employe at the time of the injury must be engaged in the regular work he was employed to do. As already stated, the complaint does not show whether or not the plaintiff was employed to do work in the line of the defendant's business. Not only is there no such allegation, but the contrary appears from the allegations of the complaint. Instead of being engaged in mason or concrete work he was in fact engaged at the time of the accident in excavating work under a foundation wall, which kind of work cannot by fair intendment be deemed any part of mason or concrete work, still less the laying down of concrete sidewalks. The distinction between the kind of work the plaintiff was doing when injured and the kind of work which constituted the defendant's regular line of business is emphasized by the classification of the former, namely, "excavation," in a different group (13) from the latter (42) in section 2 of said law. The words of the Court of Appeals in the Bargey Case, supra, fit the present situation. There the defendant's business was the manufacturing of macaroni, which was named as a hazardous employment in group 33 of the act. The workman was injured while engaged in placing a partition in one portion of the building, in another portion of which the defendant carried on its business. The Appellate Division (170 App. Div. 103, 155 N. Y. Supp. 1076 and also the Court of Appeals held that the case was not within the act. At page 413 of 218 N. Y., at page 408 of 113 N. E., the Court of Appeals said:

"The appellant invokes also the part of the language creating group 42 as follows: 'Construction, repair and demolition of buildings.' It is answered by the fact that the company did not carry on the occupation of constructing, repairing, and demolishing buildings for pecuniary gain. This conclusion is obvious beyond the need of discussion."

The complaint must be taken as fixing the status of the parties (see Nulle v. Hardman, Peck & Co., supra), and, taking this as controlling, it is manifest that none of the essential features to bring the case within the statute have been shown in the present case. It is true that the defendant was at the time of the accident, carrying on a hazardous piece of work, but not as a part of his regular business or employment, to use the statutory word, but rather as an exceptional and casual enterprise, not even having any apparent relation to his business. In fact, it affirmatively appears that the premises where the work was being done were not the premises where the defendant had his princi-

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pal office. In this situation it is plain that the facts pleaded in the camplaint do not bring the case within the statute as it was in force at the time when the acident happened, and consequently that the plaintiff is not barred from maintaining the present common-law action, the complaint in which, to my mind, states a good cause of action. The case of Matter of Larsen v. Paine Drug Co. 218 N. N. 252, 112 N. E. 725, cited by the defendant, is not in conflict with the views above expressed. There the employe was killed while engaged in work fairly incidental to the prosecution of the business of the employer and appropriate in carrying it forward and providing for its needs, while here, so far from that appearing to be the fact, so far as the compalint shows anything on the point, it indicates the contrary. Neither is Matter of McNally v. Diamond Mills Paper Co., 223 N. Y. 83, 119 N. E. 242, in point, because the work the employe was there doing when injured was fairly incidental to his work in the line of the employer's regular business,which fact, as already stated, does not appear in the case at bar.

[8] Inasmuch as the present case does not appear by the complaint to come within the statute, it was not necessary for the plaintiff, in order to maintain this action, to allege affirmatively in his complaint that the defendant has failed to secure payment of compensation for his injured employes and their dependents. This is only required where it is sought to bring a case covered by the statute within the above-mentioned exception to the rule. See the Nulle Case, supra. It is only where a plaintiff has pleaded his case within the statute that he has to go further and plead it out of the statute again. Such was the decision in Nilsen v. American Bridge Co., 221 N. Y. 12, 116 N. E. 383, where the action was brought to recover damages for injuries received while the plaintiff was performing his duties as an employe of the defendant. The complaint alleged a cause of action for negligence at common law, but did not allege or disclose that the plaintiff was engaged as an employe in a hazardous employment at the time the injury was sustained, nor whether the parties were subject to the provisions of the Compensation Law, and it was held that the question whether or not the plaintiff by reason of said law was barred from the right to recover was not presented, and that therefore a demurrer to the complaint for insufficiency could not be sustained upon the ground that the complaint failed to state facts constituting a cause of action, merely because the recovery provided in the Compensation Law is exclusive. If I am right in the view above expressed that the complaint here does not show the case to be within the statute, then the decision just cited is conclusive in favor of the plaintiff. The briefs on both sides proceed on the theory that the case falls wholly within or wholly without the Workmen's Compensation Law. The injuries alleged are many and various, covering almost the plaintiff's entire body from head to foot. Among the injuries so alleged are a shock to his sympathetic nervous system, contusions over his entire body, accompanied with severe pain, the crushing of his right foot, the loss of the sense of feeling in two of the toes, a burning sensation in the top of the foot, permanent injury to the spine, the displacement of the upper three segments of the coccyx, from which he suffers incessant pain, hernia in the right inguinal region, severe bruises to his head, loosening of the teeth, with consequent aching to the preclusion of normal sleep, deep cut on the back of his neck, the formation of a lump on the lower right ribs toward the back, which occasioned severe pain on his coughing or breathing, permanent injury to the left sacro iliac articulation and to the bone tissue in that region. It seems to me that, quite apart from the grounds above stated, there may well be a question whether some of the injuries alleged are not of such a character that they could not, under any circumstances, fall within the

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Workmen's Compensation Act. Under the decision made in Wagner v. American Bridge Co., 172 App. Div. 876, 158 N. Y. Supp. 1043, it would seem that such of the injuries as impair the plaintiff's industrial efficiency, and consequently reduce his earning capacity, are provided for in the last clause of subdivision 3 of section 15 of article 2 of the Compensation Act, beginning with the words "other cases." But conceding that some of the plaintiff's injuries such as his spinal injury and his hernia, are such as impair his earning power and consequently are embraced in the act, and so are injuries that he cannot recover for in a common-law action, the question nevertheless remains whether his other injuries, such as pain and suffering and loss of sleep, which do not seem to have any necessary or even apparent connection with his earning power as as common laborer, are not wholly outside the Compensation Act, and consequently injuries for which he is entitled to recover in a common-law action. Inasmuch, however, as this question has not been discussed nor suggested in the briefs, and inasmuch as a decision on this point in favor of the plaintiff would lead to the same result as I have reached on the grounds above discussed, I will not give any further consideration to it.

My conclusion is that the motion should be denied, with $10 costs. Settle order on notice.

MUNICIPAL COURT OF CITY OF NEW YORK.

BOROUGH OF MANHATTAN, NINTH DISTRICT.

STATE INDUSTRIAL COMMISSION OF NEW YORK

v.

BARENE ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURY IN ANOTHER STATE.

Where one was hired in New York for work outside the state by a concern doing no work within the state considered hazardous by the New York Compensation Law, and he proceeded to another state and was there injured, an award of compensation under the New York law was authorized, though the work was to be done outside of the state.

(For other cases, see Master and Servant, Dec. Dig. § 368.)

Action to recover an award made by the State Industrial Commission of the State of New York against Otto Barene, Otis Barene, and Carrie Barene, doing business under the firm name and style of Otto Barene & Son. Judgment for plaintiff.

Bernard L. Shientag, of New York City (Edward Quigley, of New York City, of counsel), for plaintiff.

Charles W. Walter, of White Plains, for defendant.

LAURER, J. This is an action brought to recover the amount of an award made by the State Industrial Commission of the state of New York. The following facts appear without dispute:

*Decision rendered, June, 1919. 177 N. Y. Supp. 689.

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One Carsten Anderson was hired by a foreman of the defendants in the borough of Brooklyn, state of New York, to perform certain work which was being done by the defendants at Stamford, Conn. At the hearing held before the State Industrial Commission upon the claim filed by Anderson, it appeared that, at the time of the hiring, the defendants, the employers, were not performing any work within the state of New York considered hazardous by the Workmen's Compensation Law (Consol. Laws, c. 67). It was conceded that the defendants carried workmen's compensation insurance for their employees in the state of Connecticut with the Employers' Liability Assurance Corporation, and further that Anderson received $210 from the Employers' Liability Assurance Corporation in settlement of an award of compensation made under the rules of the state of Connecticut, and that that amount was credited to the defendants and deducted from the amount of the several awards made by the State Industrial Commission of the state of New York; the total amount of the several awards being $610.

The defendants contend that the State Industrial Commission of the state of New York had no jurisdiction to make an award, inasmuch as the only work which the employee, Anderson, was engaged to perform, was that of structural carpenter at Stamford, Conn., at which job he was injured, and that the defendants were not at any time during the period of claimant's employment engaged in any hazardous business within the state of New York.

The defendant relies upon the authority of the case of Smith v. Heine Boiler Co., 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316. It is true that in that case the court indulges in language which would seem to uphold the contention of the defendants; but that language seems to me to be merely obiter, and the facts of that case are different from those of the case now under consideration. In that case, at the date of the contract of employment (1900) there was no Workmen's Compensation Act in New York state. In 1916, when the accident happened to the employee in that case, the employer was subject to no duty to insure its employees under the law of the state of New York, except as to such employees as it might send within the state of New York. It was held that the New York law does not attempt to regulate the duty of foreign employers in the conduct of their business within foreign jurisdictions.

In the case of matter of Post v. Burger & Gohlke, 216 N. Y. 544, 549, 111 N. E. 351, Ann. Cas. 1916B, 158, it was held that it was the intention of the Legislature to require that in every contract of employment in the cases provided by the act there should be included and read into the contract the provisions of the act, and that such provisions should be applicable in every case of injury wherever the employee is engaged in the employment, and that the parties are bound thereby without reference to the place where the injury occurs. The court points out that by virtue of section 21 of the Workmen's Compensation Law it is provided that, in the absence of substantial evidence to the contrary, it must be presumed that the claim comes within the provisions of the act. The court further points out in the course of its opinion that the Workmen's Act was passed pursuant to a widespread belief in its value as a means of protecting workingmen and their dependents from want, in case of injury when engaged in certain specified hazardous employment. The court says:

"The danger of injured workingmen and their dependents becoming objects of charity is just as great when an accident occurs outside of the boundaries of the state as it is when it occurs within the state. The interest of the state in its citizens is just as great in one case as in the other. * * * The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive

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contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for disability or the death of the employee as therein stated."

In view of the fact, therefore, that a resident of the state of New York was employed by virtue of a contract made in the state of New York, it seems to me that it must be held that the State Industrial Commission of the state of New York had jurisdiction to make the award, even though the work contemplated to be done by the employee was outside of the state.

In the case of Matter of Smith v. Heine Boiler Co., supra. on which the defendant relies, is contained the statement that it is not decisive that the employment had its origin in this state, citing in support of that contention the case of Matter of Gardner v. Horseheads Construction Co., 171 App. Div. 66, 156 N. Y. Supp. 899. The doctrine of law promulgated by that decision, which was handed down January 5, 1916, would seem to have been repudiated by the Court of Appeals in the case of Matter of Post v. Burger & Gohlke, supra, which was handed down January 11, 1916. In the case of Matter of Gardner v. Horseheads Construction Co., 171 App. Div. 66, 156 N. Y. Supp. 899, the Appellate Division for the Third Department returned the case for correction of the findings to the State Industrial Commission. The Commission made a new award, which was made the basis of a new appeal, and the same Appellate Division affirmed the award without opinion (181 App. Div. 915, 167 N. Y. Supp. 1101), reversing its earlier decision in the same case.

Judgment is accordingly given for the plaintiff in the sum of $400.

SUPREME COURT OF OKLAHOMA.

ST. LOUIS & S. F. RY. Co.

v.

FRASER. (No. 6606.)*

1. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS—INJURY IN INTERSTATE COMMERCE—QUESTION FOR JURY.

In the trial of a cause arising under the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 8657-8665, and sections 8605-8615, 8617-8619, 8621-8623) when there is testimony raising an issue of fact on the question as to whether or not the defendant railway company was at the time engaged in interstate commerce and whether or not the plaintiff at the time of the injury was so engaged in interstate commerce, it becomes a question to be submitted to the jury for their determination.

(For other cases, see Master and Servant, Dec. Dig. § 284[1].)

2. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS—INJURY IN INTERSTATE COMMERCE—QUESTIONS FOR JURY.

The record shows that there was sufficient testimony tending to show that the plaintiff, as well as the defendant, at the time of the injury,

*Decision rendered, June 27, 1916. On rehearing, Sept. 9, 1919. 183 Pac. Rep. 478., Syllabus by the Court.

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was engaged in interstate commerce, to authorize the submission of this issue for the determination of the jury. *Held,* the court committed no error in overruling the motion for a directed verdict.

(For other cases, see Master and Servant, Dec. Dig. § 284[1].)

Commissioners' Opinion, Division No 5.

Error from District Court, Carter County; S. H. Russell, Judge.

Suit by Thomas C. Fraser against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed on rehearing.

R. A. Kleinschmidt, of Oklahoma City, and E. H. Foster, of Muskogee, for plaintiff in error.

Johnson & McGill and W. F. Bowman, all of Ardmore, for defendant in error.

LINN, C. The parties will be designated as they were on the docket of the trial court.

[1, 2] The plaintiff, Thomas C. Fraser, instituted suit in the district court, basing his cause of action upon the federal Employers' Liability and Safety Appliance Acts (U. S. Comp. St. §§ 6657–8665, and sections 8605–8615, 8617–8619, 8621–8623), claiming damage as the result of an accident caused by the negligence of the defendant while engaged as an employee in interstate commerce. The injury occurred while switching cars in the town of Ft. Townsend, on the line of road owned and operated by the defendant running from Ardmore, Okl., to Hope, Ark. The plaintiff's testimony tended to show that, after they had finished switching the cars on the house track, he went to the main track, were a portion of the crew were trying to make a coupling; that three or four efforts were made to couple the cars, but that they were unable to make the coupling; that he signaled the fireman, and the train was pulling up; that the coupler was an old coupler, and raised or opened with a lever; that he worked the lever two or three times, and saw it would not open; that he and the conductor and another brakeman gave the signal to the fireman to back up and stop, and it was while it was stopped that he went in to adjust the coupling; that the only way he knew the fireman saw his signal was that he answered his signal by stopping; that the coupler was an old one, and it was the second time he had ever seen one like it. That it was what is called a "side puller"; that he never signaled the fireman to move after he had signaled him to stop. He then turned to go to a car just west of him, and as he turned the engineer pulled up and hit him, knocked him down, and he fell on his back and was injured; that they had some cars in the train for Hope, Ark; and that it was an interstate train they were making up at the time of the injury.

There was but little controversy as to the manner in which the plaintiff was injured. There was testimony on the part of the defendant tending to show the plaintiff guilty of contributory negligence and violation of some of the rules of the company, and that there were no cars in the train the destination of which was beyond the state line. These were controverted questions of fact and were submitted to the jury. The questions raised on this record require a consideration of assignments of error 5, 6, and 8, which present for consideration: First, errors asserted in overruling the defendant's motion for peremptory instruction; second, in retaining jurisdiction of the cause, since it is said that the evidence showed that the train upon which plaintiff was working was a local train, and was not engaged in interstate commerce; and in refusing to submit to the jury requested instruction No. 29.

It is the contention of the defendant that it affirmatively appears

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from the undisputed evidence that the cause was not one arising under the Employers' Liability Act, for the reason the defendant was not at the time of the alleged injury engaged in interstate commerce, and that plaintiff at such time was not engaged in interstate commerce. We are of the opinion that this contention is not supported by the record. While it is not entirely clear that the train, or some of the cars in the train in question, was destined for points beyond the limit of the state, yet there was sufficient testimony on this point to raise an issue of fact and the court did not err in submitting this issue to the jury.

[3, 4] Under this assignment it is further contended that, even if there were sufficient evidence to submit this issue to the jury, the court erred in refusing to give instruction No. 29. This instruction was framed by counsel for the defendant as applicable to the facts in submitting this point to the jury. It seems the trial court found no particular objection to the instruction as framed, but refused to submit the same to the jury, for the reason that issue had been covered by appropriate language in the court's general charge, in an instruction as follows:

"You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement or transportation of a car or cars of freight destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in any of the other cars of the train that was to be transported between interstate points; but plaintiff must show by a fair preponderance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the act of Congress of April 22, 1908, will apply to this case. If, on the other hand, plaintiff has not proven that he was employed in interstate commerce at the time of the injury, then the act of Congress of April 22, 1908, would not apply in this case, and in such event the plaintiff cannot recover."

The criticism lodged against this instruction is that it did not give the jury a clear understanding as to what was meant by the term "interstate commerce," and for this reason it was error for the court to refuse the instruction requested. We are unable to agree with counsel, but we are of the opinion that, taking this instruction as a whole, the jury could not have reasonably misconstrued its purport. The court specifically, in clear and unequivocal language in this instruction, told the jury it was necessary for the plaintiff to show that he was engaged in assisting in the transportation of cars or freight destined for movement from a point in one state to a point in another state. Therefore the court committed no error in submitting this issue to the jury, or in refusing to give the requested instruction nor in giving the instruction quoted. St. L. & S. F. Ry. Co. v. Brown, 45 Okl. 143, 144 Pac. 1075,

[6] There is no merit in the contention of the defendant, made under assignment of error No. 5, that there was no testimony of negligence warranting the court in submitting this issue to the jury. St. L. & S. F. Ry. Co. v. Brown, supra. Assuming plaintiff's testimony to be true, and, the jury having found in his favor, it must be assumed to be true, we think it strongly tends to show negligence in the employe of the defendant company in charge of the train resulting in the injury complained of, and we might say the same regarding the second and third points made under this assingment.

It is next contended that the plaintiff could not recover for the reason it affirmatively shows that he was violating rule of the company No. 636, at the time of the injury. This rule has reference to the signals

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given to the engineer, and provides that an employe must not assume that such signals have been seen; and as we said in regard to plaintiff's testimony, if it is true, then there can be but little doubt that his signal was seen, for he testifies that it was acted upon by the fireman and engineer, and of course it would not be an unwarranted assumption that if the signal was obeyed, it must have been seen.

It is next contended that the court should have submitted to the jury requested instructions Nos. 15 and 21. We are of the opinion that the court fairly covered this point in instructions 6 and 11 of the general charge, as the court plainly told the jury in these instructions that it was the duty of the plaintiff to obey the rules of the company, and that if his injuries were due to or contributed to by his disobedience of such rules, that such would constitute contributory negligence; and further told the jury in part of paragraph 11, that if the train was in motion when the plaintiff went between the cars; by reason of which he received the injuries, he would not be entitled to recover.

It is next insisted that the court committed error in submitting to the jury instruction No. 8. This is practically the instruction submitted to the jury in the case of St. L. & S. F. Ry. Co. v. Brown, supra, which was held by this court to be without error, and the decision of this court was on May 22, 1916, affirmed by the federal Supreme Court, and a similar instruction to this one was affirmed and held by that court to be specifically in the language of the statutes.

[5] It is next contended that the court committed error in refusing to instruct the jury that concurrence of all the jurors was essential to a verdict, and in instructing the jury that a verdict might be rendered by nine or more of their number. This point was also raised in the case of St. L. & S. F. Ry. Co. v. Brown, supra, and held to be without merit by the federal Supreme Court. Minneapolis & St. L. & S. F.. Ry. Co. v. Bambolis, 241 U. S.. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505.

We might say that the facts in this case are very similar to the facts in the case of St. L. & S. F. Ry. Co. v. Brown, supra, and the instructions of the court given in that case were very similar to the instructions given in this case.

Finding no merit in any of the contentions made by the defendants, the judgment of the trial court should be affirmed; and it is so ordered.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. On rehearing this cause, and upon a careful re-examination of the record, the court is convinced that the opinion of Commissioner Linn, filed June 27, 1916, affirming the cause, was a correct and proper disposition of same. Therefore the opinion is adhered to and the judgment of the lower court affirmed.

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SUPREME COURT OF OKLAHOMA.

BOARD OF COM'RS OF KINGFISHER COUNTY

v.

GRIMES ET AL. (No. 9735.)*

2. MASTER AND SERVANT WORKMEN'S COMPENSATION LAW—ENGINEERING WORKS."

The term "engineering works" as used in section 2 of article 1, c. 246, Sess. Laws 1915 (Workmen's Compensation Law) refers to establishments or places of business where engineering work is carried on, and does not include or refer to work of an engineer on a public highway.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Kane, J., dissenting.

Appeal from State Industrial Commission.

Proceedings by Bishop Early Grimes before the State Industrial Commission against the Board of County Commissioners of Kingfisher County. From an award to Grimes, the Board of County Commissioners appeals. Reversed and remanded.

W. A. Mc Cartney, Co. Atty., of Kingsfisher, for appellant.
S. P. Freeling, Atty. Gen., for respondents.

OWEN, C. J. This appeal is prosecuted to reverse an award made by the State Industrial Commission to Bishop Early Grimes on account of an accident sustained while riding in an automobile to the place of work where Grimes was to assist the county engineer in surveying a state highway.

The question presented is whether Grimes was engaged in a hazardous employment within the meaning of section 2, art. 1, of the Workmen's Compensation Law (chapter 246, Sess. Laws 1915). It is urged that, since Grimes was employed to assist in doing engineering work, the injury falls within the provisions of section 2, in which it is provided compensation shall be payable for injuries sustained by employe in "engineering works." In the case of Finney v. Board of County Com'rs, 1 Okl. Indus. Com. Rep. p. 102, the commission construed the term "engineering works" to mean any work of engineering, and that case was folowed as authority by the commission in the instant case.

In defining "engineering works" as any work of construction, the comission quoted from 15 Cyc. 1049. Reference to the page will disclose the error. The term there used is "engineering work," and not "works."

[1, 2] The meaning of a word used in the statute must be construed in connection with the words with which it is associated. 22 Cyc. 1065; 36 Cyc. 1118. Some of the associated words are: "Factories," gins," "mills," "workshops where machinery is used," "gas works "waterworks," reduction works," "power works—all referring to establishments and places of business rather than character of labor. The word "work," as used here, is defined in Webster's International Dictionary as:

*Decision rendered, July 29, 1919. 182 Pac. Rep. 897. Syllabus by the Court.

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'A place where industrial labor of any kind is carried on, as a salt work; the structure, grounds, machinery, etc., of a manufacturing establishment or industrial concern, as iron works, locomotive works, waterworks."

In the case of So. St. Joe Land Co. v. Pitt, 114 Mo. 135, 21 S. W. 449, the Supreme Court of Missouri construed the word "works" as meaning an estblishment for manufacturing, or for performing industrial labor of any sort, and including the building, machinery, etc., used in the required operation. The Supreme Court of Massachusetts, in the case of Conroy v. Inhabitants of Clinton, 158 Mass. 318, 33 N. E. 525, construed the word "works" to mean an establishment for manufacturing or for performing industrial labors. The Supreme Court of Pennsylvania in Re Pardee's Appeal, 100 Pa. 408, construed the word "works" to have a definite signification, meaning a business of permanent character, as opposed to temporary employment. We are constrained to hold that the term "engineering works," as used in section 2 of the act, refers to establishments or places of business where engineering work is carried on, and does not include or refer to work of an engineer on a public highway.

[3] This section of the act also provides if there be or arise any hazardous occupation other than those enumerated it shall come under the act. It is urged that work on the state highway is a hazardous occupation and is included under this provision of the section. This language must be construed, under the rule of ejusdem generis, with that more particularly described by the preceding words of the context. General words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms. This general language must be construed to include employments of the same general character, but not embracing every species of employment in which the services of others may be rendered. K. C. So. Ry. Co. v. Reinman, 162 Pac. 726; 36 Cyc. 1119; State ex rel. v. Gordon, 268 Mo. 321, 188 S. W. 88; Black v. Commonwealth, 171 Ky. 280, 188 S. W. 362; Zucarro v. State (Tex. Cr.) 197 S. W. 982, L. R. A. 1918B, 354.

The case of Board of Com'rs v. Barr, 173 Pac. 206, is relied upon, but is not in point. In that case Barr was engaged in doing blasting work on the state highway, but the question presented was not whether that was hazardous employment, but whether he was an employe of the county.

The judgment of the commission is reversed and the cause remanded, with directions to dismiss the petition.

Sharp, Harrison, Pitchford, Johnson, and McNeill, JJ. concur.

Kane, J., dissents.

Rainey and Higgins, JJ., not participating.

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SUPREME COURT OF PENNSYLVANIA.

HANCOCK

v.

PHILADELPHIA & R. RY. CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACT—FINDING OF FACT BY WORKMEN'S COMPENSATION BOARD—CONCLUSIVENESS.

Finding of Workmen's Compensation Board against employer's contention that deceased was engaged in interstate commerce, and to effect that coal cars on which he was working were being moved from mines to different yards in the state for the shipper's convenience, and that the subsequent shipments of cars outside the state were made after employe's death, is conclusive on court of common pleas.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Comon Pleas, Schuykill County.

Proceeding under the Workmen's Compensation Act by Margaret L. Hancock against the Philadelphia & Reading Railway Company. From a judgment affirming an award of the Workmen's Compensation Board, and dismissing the appeal therefrom, defendant appeals. Appeal dismissed, and award affirmed.

Argued before Brown, C. J. and Stewart, Moschzinsker, Walling, and Kephart, JJ.

George Gowen Parry, of Philadelphia, and John F. Whalen, of Pottsville, for appellant.

L. L. Frank, of Pottsville, and R. A. Reick, of Frackville, for appellee.

PER CURIAM. The sole contention of the appellant is that at the time the deceased was killed he was engaged in moving interstate commerce cars. This was a qestion of fact, and the finding of the Compensation Board was that the cars of coal in the train upon which the deceased was working were being transported from the mines to different yards within the state. for the convenience of the shippers, and that the subsequent shipments of any of them upon which the deceased had worked to a point without the state were made after his death, and after the train crew with which he had worked had severed its connection with the cars. This finding was conclusive upon the learned court below. Poluskiewicz v. Phila. & Reading Coal & Iron Company, 257 Pa. 305, 101 Atl. 638.

Appeal dismissed, and award affirmed.

*Decision rendered March 24, 1919. 107 Atl. Rep. 735.

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SUPREME COURT OF PENNSYLVANIA.

REILLY

v.

ERIE R. CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY WHILE ENGAGED IN INTERSTATE COMMERCE—FINDING BY REFEREE.

In proceeding under Workmen's Compensation Act June 2, 1915, wherein defendant railroad contended that injury occurred while employe was engaged in interstate commerce, referee should have made finding as to whether injury occurred while employe was so engaged.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY WHILE ENGAGED IN INTERSTATE COMMERCE.

No compensation can be awarded under the Pennsylvania Workmen's Compensation Act of June 2, 1915, for injury caused while the workman was engaged in interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 365.

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF WORKMEN'S COMPENSATION BOARD —RECOMMITTAL TO REFEREE.

Where referee concluded that it was immaterial whether accident occurred while employe was engaged in interstate commerce, and failed to find whether injury occurred therein, Workmen's Compensation Board, upon appeal, should have held conclusion error, and either have made findings of fact upon a hearing denovo on that issue, or have sent record back to referee, with direction to find thereon.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FAILURE TO MAKE NECESSARY FINDINGS—REMAND OF RECORD WITH DIRECTIONS.

On appeal from award of Workmen's Compensation Board, only findings and conclusions are before court for review, and where there are no findings upon controlling issues, it should remand record to board, with direction to make findings, instead of itself deciding issues upon the evidence, as Workmen's Compensation Act contemplates that all findings of fact be made by compensation authorities, and not by the courts.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from Court of Common Pleas, Susquehanna County.

Proceeding under the Workmen's Compensation Act (P. L. 736) by Sarah E. Reilly, for herself and children, against the Erie Railroad Company for compensation for the death of claimant's husband. From a judgment reversing the action of the Workmen's Compensation Board,

*Decision rendered, April 14, 1919. 107 Atl. Rep. 736.

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affirming a finding of the referee awarding compensation, claimant appeals. Reversed, and record sent back to common pleas, with direction.

Argued before Stewart, Frazer, Moschzisker, Walling, and Kephart, JJ.

Thomas A. Doherty, of Susquehanna, for appellant.
William A. Skinner, of Susquehanna, for appellee.

MOSCHZISKER, J. Sarah E. Reilly, on behalf of herself and children, claimed compensation for the death of her husband, Martin J. Reilly, which occurred April 28, 1916, as the result of accidental injuries in the course of his employment with defendant company. An award was approved by the Workmen's Compensation Board; but, when the record was removed to the common pleas, this was reversed, and the claimant has appealed.

[1-3] Defendant has contended from the first that claimant's husband was killed while engaged in interstate commerce; but, without finding any of the facts attending the accident or those essential to a correct understanding and intelligent determination on review of the point thus put at issue, the referee reported the following conclusion:

"Whether or not either the decedent or the defendant at the time the accident occurred were engaged in an act connected with interstate commerce, the claimants are entitled to and defendant is liable for compensation to the claimants as provided in article 111 of the Workmen's Compensation Act of 1915."

Of course this presents an erroneous view of the law. Messinger v. Lehigh Valley R. R. Co., 261 Pa. 336, 337, 104 Atl. 623.

The appeal to the Compensation Board was on two grounds: (1) That the referee erred in the above-quoted conclusion of law; and (2) that he erred in failing to find as a matter of fact that claimant's husband was engaged in interstate commerce at the time of the accident. But the board did not properly pass upon either of these assignments. Instead of so doing, it contented itself with a meager review of the testimony, and the conclusion that the referee had not erred in failing to find "claimant's decedent was engaged in interstate commerce." The board should have held that its referee's ruling as to the immateriality of the interstate commerce feature of the case was error, and either found its own facts, upon a hearing denovo, or sent the record back to the referee, with directions to state all the circumstances attending the accident essential to an understanding of the issues involved, with an ultimate finding, based thereon, as to whether or not injury in the course of interstate employment was shown thereby. Flucker v. Carnegie Steel Co., 263 Pa. 113, 106 Atl. 192.

[4] When the case came to the common pleas, the record was treated by mutual mistake of both court and counsel, as though the evidence was up for review, when, as matter of law, the findings and conclusions only were before that tribunal. McCauley v. Imperial Woolen Co., 261 Pa. 312, 320, 321, 104 Atl. 617. Since there were no findings, either subordinate or ultimate, upon the controlling point discussed in the opinion of the court below, namely, whether the employer and the employe were engaged in interstate commerce at the time of the accident, the record should have been remanded to the Compensation Board (Leary v. McIlvain, 263 Pa. 499, 106 Atl. 788), with directions to see that such findings were made and properly stated upon the record (Gurski v. Susquehanna Coal Co., 262 Pa. 1, 104 Atl. 801; Hancock v. P. & R. R. R. Co., 107 Atl. 735, not yet officially reported).

In Messinger v. Lehigh Valley R. R. Co., supra, the referee stated an ultimate finding that, at the time of the accident, the "employer and

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employe were then engaged in interstate commerce." This "mixed finding of fact and law" (Mooney v. Lehigh Valley R. R. Co., 261 Pa. 339, 340, 104 Atl 624) ,from some aspects a pure matter of fact (and so treated in Hancock v. P. & R. R. R. Co., supra), was adopted by the Compensation Board, and the latter's decision was affirmed by the common pleas. On appeal this court, following the McCauley Case, supra, refused to consider testimony, and held that, since there were "no subordinate or underlying findings" as to the character of evidence upon which the ultimate finding rested, we could not enter upon an examination of the correctness of the latter, but would have to accept it as conclusive; hence we affirmed.

The Messinger Case, however, differs from the one at bar, in that the referee there found, as a fact, that the accident had happened in the course of interstate commerce, which finding was approved by the board, whereas here the referee erroneously held it to be immaterial whether or not the accident so happened, and neither he nor the board made any finding whatever upon that issue. The court below, under these circumstances, was not in a position to determine the controlling point in the case, nor are we. As a consequence, since this is a purely statutory proceeding in which the relevant acts of assembly contemplate that all findings of fact shall be made by the compensation authorities, the record must be remanded for that purpose; but, so as to minimize the delay thus entailed we have disposed of this appeal with the utmost expedition, and a like course should be pursued by those fixed with responsibility below..

The assigments of error are sustained, the judgment is reversed, and the record is sent back to the common pleas, with directions that it forthwith remand so much thereof to the Workmen's Compensation Board as was sent up by that body; the latter being ordered to proceed in accordance with the law and proper practice, as outlined in this opinion and the relevant authorities therein cited.

SUPREME COURT OF PENNSYLVANIA.

McGURRIN

v.

HUDSON COAL CO.*

MASTER AND SERVANT—FINDINGS OF WORKMEN'S COMPENSATION BOARD—CONCLUSIVENESS.

In widow's proceeding under Workmen's Compensation Act for damages for death of her husband, a finding by Workmen's Compensation Board that he died of natural causes and that there was no evidence that there had been "any accident at all" is conclusive upon the court on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas. Lackawanna County.

Proceeding under Workmen's Compensation Act (Act June 2, 1915 [P. L. 736]), by Mary A. McGurrin against the Hudson Coal Company.

*Decision rendered March 24, 1919. 107 Atl. Rep., 687.

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From an order dismissing an appeal from the Workmen's Compensation Board, which had reversed an award of the referee in favor of the claimant, she appeals. Appeal dismissed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, and Kephart, JJ.

William J. Fitzgerald, of Scranton, and Roger J. Dever, of Wilkes-Barre, for appellant.
James H. Torrey, of Scranton, for appellee.

PER CURIAM. The appellant claims compensation from the appellee on the ground that the death of her husband resulted from an accident which occurred while he was in its employ. The finding of the Compensation Board is that he died from natural causes, and that there was no evidence that there had been "any accident at all." This was conclusive upon the court below, and it properly so held. Poluskiewicz v. Philadelphia & Reading Coal & Iron Co., 257 Pa. 305, 101 Atl. 638.
Appeal dismissed.

SUPREME COURT OF PENNSYLVANIA.

NEARY
v.
PHILADELPHIA & READING COAL & IRON CO*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INSTRUCTION—REFUSAL OF MEDICAL SERVICES.

The words "shown to have resulted from such refusal," in Workmen's Compensation Act June 2, 1915, § 306 (e), modify preceding words "injured" and "increase," so that claimant is not deprived of all compensation for his refusal to accept medical services from employer and his employment of a different physician, but only of compensation for an injury or increase of incapacity caused by the refusal, notwithstanding section 301, defining "injury" and "personal injury."

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Appeal from Superior Court.
Proceeding by Anthony F. Neary against the Philadelphia & Reading Coal & Iron Company. From a judgment of the Superior Court (69 Pa. Super. Ct. 562), dismissing an appeal from an order of the common pleas sustaining an award of the Workmen's Compensation Board, defendant appeals. Affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Walling and Kephart, JJ.

John F. Whalen and George Ellis, both of Pottsville, for appellant.
Francis H. Bohlen and Isaac M. Price, both of Philadelphia, for appellee.

*Decision rendered, March 24, 1919. 197 Atl. Rep. 696.

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WALLING, J. This case is under the Workmen's Compensation Act of June 2, 1915 (P. L. 736). Plaintiff, while in defendant's employ as car runner, on March 9, 1916, had a finger so crushed as to require surgical and medical assistance, which was reasonably tendered by defendant. However, after accepting such assistance for three days, plaintiff consulted his own family doctor, who thereafter took charge of the case and rendered suitable surgical and medical assistance, so that plaintiff was not injured nor his incapacity increased by the change of physicians. But it is strenuously contended that plaintiff, by his refusal to accept the reasonable assistance so tendered, forfeited all right to compensation for the injury This contention is based on the last clause of paragraph "e" of section 306 of the act (page 743), which states:

"If the employe shall refuse reasonable surgical, medical, and hospital services, medicines and supplies, tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

The referee duly heard the case, made formal findings, and awarded plaintiff compensation, from which defendant, on the question of law above stated, appealed successively to the Compensation Board, the court of common pleas, the Superior Court, and now to this court. The award was clearly right, as the natural construction of the words "shown to have resulted from such refusal" refer to "any injury," as well as to "any increase in his incapacity." Chairman Mackey, of the Compensation Board, properly interprets this clause as though it read.

"If the employee shall refuse reasonable surgical, medical, and hospital services, medicines and supplies, tendered to him by his employer, he shall forfeit all right to compensation for any increase in his incapacity shown to have resulted from such refusal."

The manifest purpose is to protect the master from any loss that might result because of the servant's refusal to accept the tendered assistance, not to penalize the latter for exercising the important privilege of employing his own physician. However, by so doing the employee assumes the responsibility for his own treatment, and must bear the loss resulting from neglect or lack of skill therein.

If by refusing the tendered assistance the servant forfeits all right to compensation for the injury he has sustained, then the balance of the sentence is meaningless; for if his right to recover for the primary disability is gone, the whole claim is gone and the master has no concern with the question of increased incapacity, which would be but a part of the claim already forfeited; and the fact that the employer is expressly released from liability for the increased incapacity caused by the employee's refusal to accept the proffered medical assistance is inconsistent with the claim of an entire forfeiture, as the express provision that certain conduct shall constitute a forfeiture of a designated part of the claim implies that the balance remains.

Appellant calls our attention to that clause in section 301 of the act (page 738) which provides that:

"The terms 'injury' and 'personal injury' as used in this act shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom."

Conceding that such definition applies to the word "injury," as used in the clause in question, it does not change the construction. Malpractice might constitute a violence to the physical structure of the body, and disease or infection might naturally result from refusal to accept the reasonable surgical or medical services tendered to an injured employee. But it is not necessary to anticipate the cases where iniury might result from such refusal.

The assignments of error are overruled and the judgment is affirmed.

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SUPREME COURT OF PENNSYLVANIA.

REITMYER

v.

COXE BROS. & CO., Inc.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.

The Workmen's Compenstion Act was not intended to confine hiring contracts to express contracts to the exclusion of that class of contracts which arise by implication of law, where circumstances appear which according to the ordinary course of human dealings show a mutual intention to contract.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION—DEDUCTIONS.

In proceeding under Workmen's Compensation Act, where it appeared that deceased employee was paid regular weekly wages for about six months, less a deduction for supplies and tools, without objection, the refusal to make any deduction therefor in determining wages as a basis for compensation, on ground that there was no express agreement in contract of hiring for such deduction, was reversible error.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEDUCTIONS FROM WAGES—QUESTION OF LAW.

An implied contract for deduction of a certain amount for deceased employee's tools and supplies, in determining his wages as a basis for compensation, may be inferred from conduct of parties, and is a question of law, to be passed upon by court of common pleas, should ascertained facts be found sufficient therefor, and, if not, to remand record to Compensation Board, with instructions to find further.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from Court of Common Pleas, Schuylkill County.

Proceeding under the Workmen's Compensation Act by Mrs. Jacob Reitmyer against Coxe Bros. & Company, Incorporated. From an order dismissing an appeal from a decision of the Workmen's Compensation Board, confirming an award of the referee, defendant appeals. Reversed.

Argued before Brown, C. J., and Stewart, Moschzisker, Walling, and Kephart, JJ.

Daniel W. Kaercher, of Pottsville, for appellant.

Roger J. Dever, of Wilkes-Barre, and Edw. E. Beidleman, of Harrisbrug, for appellee.

STEWART, J. The appeal is from the judgment of the court of common pleas of Schuylkill county, sustaining an award of the Compensation Board in the matter of the claim of Mrs. Jacob Reitmyer, widow, against Coxe Bros. & Co., Incorporated. In determining the amount of wages earned by the employee as the basis of compensation for the as-

*Decision rendered, April 21, 1919. 107 Atl. Rep. 739.

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certainment of the amount of compensation to be awarded, the referee adopted the wage rate agreed upon by the parties, but declined to make any deduction therefrom for or on account of supplies, tools, and other things furnished and paid for by the employer, and which were necessary to the performance of the contract by the employee. The reason assigned by the referee for this conclusion was as follows:

"The contract at hiring did not specifically provide that the value of material, supplies, tools, and other things necessary for the performance of the employee's contract should be deducted from the employee's gross earnings, and the contract did not specifically provide that the employer was to furnish them, and that the employee must procure them from the employer and no one else."

Appeal was taken to the Compensation Board, with the result that, without further findings, the award of the referee was sustained and appeal dismissed. An appeal followed to the court of common pleas, with the result that the award of the referee and the decree of the board were alike sustained, and the appeal dismissed. The matter now comes before us on appeal from the judgment of the court of common pleas.

The record of the proceeding from its beginning throughout is unsatisfactory, in that it fails to discover the one and only issue in the case. The effort of appellant before the referee was to derive the terms from the admitted facts and circumstances, not appearing however, in specific findings of the referee, but which, as appellant insists, are clearly derivable from what the referee styles his "Review." His main reliance to this end was upon these facts: Reitmyer's employment covered a period extending from July 1, 1915, to January 10, 1916, when, on the date last mentioned, he met with the accident which resulted in his death on the same day. His wage earnings were $22 per week, payable semimonthly; the supplies furnished by his employer during the period amounted to $49.33; he was paid during this period his full earnings, less deduction for the supplies furnished as above, without objection or complaint from him so far as the evidence shows, making in all 12 consecutive payments, as appears from the pay rolls of the coal company which were admitted in evidence. The Compensation Board, in its opinion sustaining the referee's award, says:

"We have carefully reviewed the testimony in this case, * * * and are of opinion that no such contract of hiring as contemplated by the act was established by competent proof, and the findings of the referee that the cost of supplies, etc., should not be deducted in computing compensation due defendants should be sustained."

It will be observed that the referee rested his adverse conclusion upon the ground that "the contract of hiring in this case did not specifically provide that the value of supplies, tools, etc., should be deducted from the employee's gross earnings in making the computation," while the Compensation Board rested its affirmative of the referee's conclusion on the ground that "no such contract of hiring as contemplated by the act was established by competent proof."

[1, 2] Both conclusions seem to rest on the idea that the act of assembly contemplates some particular form or kind of agreement of hiring to which all must conform, to be effective in excluding from wage earnings, in ascertaining the basis of compensation, the cost of supplies furnished the wage earner by the employer. To sustain either of these conclusions would be to impute to the legislative mind a purpose to confine hiring contracts with which the act deals to express contracts, to the exclusion of that class of contracts which arises by implication of law where no express contract exists, but yet where cirumstances are shown which, according to the ordinary course of business dealings and

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the ordinary understanding of men, show a mutual intention to contract. When such conditions are shown, the law will not simply imply a contract, but it will derive the terms of a contract so far as practicable from the conditions shown. No warrant is to be found in the act for either the conclusion of the referee or the Compensation Board.

Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not." Hertzog v. Hertzog, 29 Pa. 465.

[3, 4] The error complained of in the present appeal from the judgment of the court below is the affirmative by the learned court of the award and decree of the Compensation Board on the ground set forth in the opinion filed, which reads as follows:

"It is contended in this case that these amounts should be deducted in computing the term 'wages.' In the opinion filed by the commission in the first paragraph appears the following: 'The first question is one of contract. It was not reduced to writing, and one of the contracting parties is dead. There was no evidence to show that the contract of hiring entered into between the claimant's deceased husband and the defendant specifically provided that the employer should furnish or pay for labor, material, supplies, or other things necessary for the performance of the employee's contract with his employer and deduct the cost thereof from the employee's gross earnings.' It will be seen from this that the Compensation Board has found as a fact that such contract did not exist. We have no power to reverse their findings of facts, and are therefore bound by this conclusion. This being so, under the plain terms of the act, the employer would not be entitled to deduct these amounts in order to form the basis of a computation on the earnings of his employee. We are therefore of the opinion that the conclusion reached by the Compensation Board was correct."

There is no pretense that an express contract of hiring existed between the parties. Whether from the facts and circumstances shown an implied hiring contract could be derived was a question of law and should have been passed upon by the court. It was error to decline to do so, and for this reason the judgment calls for a reversal. We accordingly so order, and remand the record to the court below to pass upon the question we have indicated, should the ascertained facts be found sufficient therefor; if not, to further remand the record to the Compensation Board, with instructions to find further. We suggest, as matter of law to be observed in any event, that the period of Compensation under the Workmen's Compensation Act of June 2, 1915 (P. L. 736), in cases of instantaneous death of the employee, does not begin until 14 days after death. So much has been decided in Rakie v. Jefferson, etc., Coal & Iron Co., 262 Pa. 444, 105 Atl. 638.

Judgment reversed.

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SUPREME COURT OF UTAH.

MURRAY CITY

v.

INDUSTRIAL COMMISSION OF UTAH. (No. 3372.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —FINDINGS OF COMMISSION—EVIDENCE OF INJURY—SUFFICIENCY.

Findings of the Industrial Commission that a city employe petitioning for compensation was injured in the course of his employment, and that his injury by a slight blow on the neck with a shovel handle was the immediate cause of a paralytic stroke following shortly after the accident *held* supported by evidence given by the attending physician.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by Murray City against the Industrial Commission of Utah, to set aside its award under the Workmen's Compensation Act. From judgment or order for plaintiff vacating and setting aside the award, the Commission appeals. Reversed, and cause remanded with directions to set aside the order and judgment and to dismiss the complaint.

Dan B. Shields, Atty. Gen., and H. Van Dam, Jr., Atty. Gen., for appellant.

D. W. Moffat, of Murray, for respondent.

GIDEON, J. It is admitted that the appellant, Murray City, as an employer, is subject to the provisions of the act of the Legislature commonly known as the Industrial Commission Act. It appears that on or about August 25, 1917, one David Hazeldine was employed by the plaintiff city, and was at that date assisting in loading with a shovel slag upon a wagon. Charles White, a teamster, in leveling the slag thrown upon the wagon, while in the act of bringing back his shovel, struck Hazeldine a very slight blow on the neck with one end of the shovel handle. A state of paralysis followed, which particularly affected the left side of the body. A petition was filed by Hazeldine with the defendant commission praying for such relief as he might be entitled to receive. Hearing was had, and an order made by the commission, directing that the plaintiff, Murray City, pay to the claimant, Hazeldine, the sum of $8.73 per week beginning September 5, 1917, and to continue so long as the disability last. Thereafter, on petition of Murray City, a rehearing was granted and additional testimony taken, whereupon the commission adhered to and reaffirmed its former decision. The plaintiff city, being dissatisfied with the award of the commission, in pursuance of Comp. Laws Utah 1917, § 3087, being section 27 of the original act of 1917, filed its complaint in the district court of Salt Lake county, asking that said award be set aside, vacated, or amended, on the ground that the decision was unreasonable and unlawful, and that said decision was not supported by evidence, but was contrary to the evidence, and that the appellant did not receive a personal injury by accident arising out of and in the course of his employment. To that complaint the commission answered, making certain admissions and denials.

*Decision rendered, July 31, 1919. 183 Pac. Rep. 331.

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Among other things it was alleged "that the court is without jurisdiction to hear evidence in the case, and that its jurisdiction is limited to reviewing the record made by the commission." To the answer was attached and filed with the clerk of the court a copy of the proceedings and testimony taken before the commission. The trial court seems to have treated the answer as a demurrer, and, after argument, overruled the same, entered judgment in favor of the plaintiff city vacating and setting aside the award made by the defendant commission. From that judgment or order the commission appeals to this court.

There is no dispute that the petitioner Hazeldine was, on the date mentioned, in the employ of the city. Neither is there any dispute that he received a slight blow in the course of his employment from the end of the shovel handle in the hands of the witness White, either by Hazeldine walking against it or by White pulling it back in leveling the slag upon his wagon. It is also conceded that it was not such a blow or contact as to cause any abrasion or make any mark or bruise upon the skin. Immediately following this, however, Hazeldine became sick; was given some assistance by his fellow workmen; was later, during the same afternoon, taken to the physician's office. On the following morning paralysis had developed so as to be, as stated by the doctor, complete.

The question for determination by this court is, is there any substantial evidence in the record to support the finding of the commision that the injury resulted from an accident received while in the course of employment?

It is conceded in the argument of counsel for Murray City that if the evidence of the physicians connects the stroke of paralysis with the injury the decision of the Industrial Commission should be sustained. It is likewise conceded by the Attorney General, appearing for the commission, that if the award can be supported such support must be found in the testimony of the attending physician, Dr. Rothwell, as is the only testimony that connects the paralysis with the accident. We think it advisable, therefore, to set out all of the testimony given by the physician bearing upon or material to the finding of the commission on that point. It is as follows:

'Q. Do you know anything as to an injury sustained by him on or about the 17th of August, 1917? A. Yes. Q. State, Doctor, what the nature of it was and the condition in which you found him. A. Mr. Hazeldine was brought to my office in a buggy on that day by two other men, I believe, and they told me at that time that he had been struck in the neck with the handle, I believe of a shovel; and at that time he had been struck, I believe, in the left side of his neck, and his head was turned very far to that side. On examination at that time he didn't show any bruise or contusion at the point of injury, and I heard from him the next day * * * I went down to see him and at the time he had a left-sided paralysis. I kept him in bed for a long time with that, and it is gradually getting better. * * * Q. Well, Doctor, was there any contusion or mark around the area of the injury developed subsequent to the first examination. A. No, sir. Q. Did you connect, in any way, the injury with his stroke of paralysis? A. Well, in this way: Of course, as far as the tap on the neck went, that would not give him the paralysis on the same side. His injury has got to be here (pointing to the base of the skull), but the way I look at Mr. Hazeldine's case, he doubtless, was carrying at that time a high-blood pressure, as tests with the instruments have since shown, and I have no doubt he was at the time of his injury, and he was working for the city on a hot August day, in a black slag dump, just about as hot a condition as you could get a man to work in. In fact, the heat was terriffic, and that would tend to make his pressure higher. He was struck in the neck, and it was started by his being struck; and he, I suppose, had jumped back, and that is when the thing happened. That is started in searing him a little bit, in connection with the already high-blood pressure, and augmented it, and

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he burst a blood vessel in the right side of the brain. Q. And you call this a stroke of apoplexy, or how do you designate it? A. Yes; a stroke of paralysis. Q. Now, do you say that this accident—while it in itself was not wholly the cause of the stroke—but would you say that it was the proximate cause? A. I would say so, Mr. Nebeker. As I would look at it, the condition is much the same as if we had a loaded cannon in this room and everything ready to be fired off. Let some one touch it off as the accident touched his off, and the whole character is changed. Q. Now, do you make any connection or relation with the fact of him being hit on the left side of the neck with his paralysis on the left side? A. No; nothing whatever. Q. Is it not a fact, Doctor, that an injury on the one side would more likely have an effect on the opposite side? A. Yes, absolutely. The only way it could happen to give him the paralysis would be to give him a fracture of the vertebræ in the neck. Then it would cross over, for they cross over right at the base of the brain. * * * Q. Now, Doctor, how soon after receiving that accident would you say from your experience as a physician that this stroke followed the accident? A. Well, now, I saw him, as I remember, around 5 o'clock in the afternoon, and he had it the next morning. It was complete the next morning. It was not complete that afternoon. Of course those things all depend on the size of the vessel that bursts. If it is a very small vessel it takes a long time to form a clot in the brain to destroy the nerve centers; while a large vessel can destroy it immediately in such a manner as to cause instant death. Q. Could you tell at your first examination at the time he was brought to your office immediately following the accident —did you determine at that time that he was suffering from a stroke? A. No; he was not. He was suffering from what we call shock, but it had not made itself evident as paralysis. Q. Is there any evidence in your mind that the shock received from the accident was the proximate cause of this stroke, or— A. Well, let me see if my idea of the proximate cause is the same as yours. Q. Would it have happened if the accident had not been sustained? A. Perhaps. As I say, that blood pressure was there, and everything was there to cause a rupture of the blood vessel, but whether or not it would ever have ruptured of its own accord no one can tell. Q. You believe, then, that the accident would aggravate or accelerate the process of the action? A. Yes, sir. Q. Did he sustain what you would call a severe stroke, to clear up as quickly as it has, or a light stroke? A. Well, rather a light stroke, to clear up as quickly as it has."

The commission made findings, and from such findings deduced the following conclusion:

"In view of the extreme hot weather, age of the applicant, and the obvious susceptibility of applicant to suffer a paralytic stroke at the time of the accident, the fact that no evidence of sickness or distress was apparent immediately before the blow, that a strange feeling, sickness, and a paralytic stroke developed in usual time immedately following the blow, it is reasonable to conclude that the blow from the shovel, received accidentally and arising out of and in the course of his employment by the defendant corporation, was the proximate case of the disability suffered by applicant, and an award of compensation should be made accordingly."

It is the contention of Murray City that there is nothing in the testimony of the physician to support the finding that Hazeldine was injured while in the course of his employment, and that, if injured, then the slight stroke which he received could not have produced the paralytic condition that followed.

As indicated above, the only qestion before this court for determination is whether the above testimony of the physician is sufficient to support the commission's findings. Without attempting to analyze in detail or set forth the deductions and conclusions that might be legally or logically drawn from the physician's testimony, we remark that we have no

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hesitancy in holding that there was testimony before the commission to support its findings, both that the applicant (petitioner) was injured in the course of his employment, and that such injury was the immediate cause of the paralytic stroke following shortly after the accident or injury. The following authorities support the conclusion reached: Honnold, Workmen's Comp. § 98; La Veck v. Parke, Davis Co., 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277; Crowley v. City of Lowell, 223 Mass. 288, 111 N. E. 786. Other phases of the Industrial Commission Act have been considered by this court in two cases, namely Industrial Co. v. Evans, 174 Pac. 825; Garfield Smelting Co. v. Industrial Com., 178 Pac. 57.

It follows from the foregoing that the district court erred in entering judgment setting aside the award of the commission. The judgment of the lower court is therefore reversed, and the cause is remanded to the district court of Salt Lake county, with directions to set aside its order and judgment and to dismiss the complaint. Appellant to recover costs.

Corfman, C. J., and Frick, Weber, and Thurman, JJ., concur.

SUPREME COURT OF WASHINGTON.

BIGLAN

v.

INDUSTRIAL INSURANCE COMMISSION OF STATE OF WASHINGTON. (No. 15287.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—AGGREGATE AWARDS.

Under Workmen's Compensation Act 1911, § 5, subds. b, f, g, a workman was not entitled to recover, for injuries classified as permanent partial disabilities awards aggregating more than the $1,500 maximum provided for permanent partial disability, notwithstanding such injuries, one of which was to the eye and the other to the arm, were received at different times, where the combined injuries did not come within the classification of permanent total disabilities enumerated in the act.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Department 1.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Proceeding for compensation under the Workmen's Compensation Act, by Owen Biglan, employee, against the Industrial Insurance Commission of the State of Washington. From an award for less than amount claimed, affirmed by the superior court, claimant appeals. Affirmed.

Gordon & Easterday, of Tacoma, for appellant.

Lindsay L. Thompson and D. E. Twitchell, both of Olympia, for respondent.

MACKINTOSH, J. For an injury sustained to the right eye in haz-

*Decision rendered, July 30, 1919. 182 Pac. Rep. 934

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ardous employment in 1913, the Workmen's Compensation Act, in the sum of $625; his injury being classified as a permanent partial disability. While still engaged in a hazardous employment, in 1916, he sustained an injury to the right arm, also classified as a permanent partial disability, and the commission administering the Workmen's Compensation Act allowed him compensation in the sum of $1,250, but, upon discovering that the appellant had theretofore received an injury classified as a permanent partial disability, canceled the award of $1,250 and made an award of $875, being the difference between the $1,500 maximum which the statute provided for permanent partial disability and the $625 already received under the first classification.

Appellant being dissatisfied with the award as finally made, appealed to the superior court, and from an unfavorable decision there appealed to this court, urging that under the Workmen's Compensation Act of 1911 there could be more than one permanent partial disability which would entitle the workman to receive awards aggregating in excess of $1,500.

Both injuries to the appellant having occurred prior to 1917, the question in this case is to be answered by a consideration of the compensation law as enacted in 1911; the particular portions of that act applicable to the situation being chapter 74, § 5, subds, b, f, and g.

Subdivision b declares:

"Permanent total disability means the loss of both legs, or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation."

Subdivision f:

"Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes. * * *"

Subdivision g:

"Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act."

Under this latter subsection, where reference is made to an accident occurring to a workman who has been previously the recipient of a lump sum payment and providing that in the event of a further accident the additional compensation shall be adjudged according to the combined effect of his injuries and his past receipt of money, there are but two classes of injuries, for the reason that the act provides the lump sum payments in two instances only: First, when the workman has suffered a permanent partial disability; or, second, where he has suffered a permanent total disability. Reference to subsection b will show that the Legislature failed to classify an injury to the eye and an injury to the arm as permanent total disabilities. This was probably by oversight. After the receipt of the first injury, the appellant was a workman permanently partially disabled, and the second injury left him permanently partially disabled according to the classification of the act as it existed at that time, contemplating that a workman permanently partially disabled should receive compensation not in excess of $1,500. It would have been well to have provided that the suffering of two permanent partial disabilities should be classified as a permanent total disabilty. But the Legislature not having made this classification, we are not empowered to raise the maximum recoverable by the appellant because we feel that the act did not place it high enough. To attempt to do so would be to disregard what seems to be the plain language of the act, which if it works unscientifically or unjustly is a matter for legislative correction.

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"The industrial insurance act is not one designed to award full compensation to each individual for all such damages as such individual would be entitled to in his peculiar circumstances, but is only a system of limited insurance whereby all industrial employees within the statute are paid definite but limited amounts for injuries without regard, as we have said, to the particular individual circumstances or needs of the injured employee. The injury alone is the subject which can be considered by the commission under the statute, and applies to and covers all classes of injuries alike." Foster v. Industrial Insurance Commission, 181 Pac. 912.

The compensation provided by the act is based and fixed upon certain schedules, and where the act, as it does in subsection g, provides that one suffering a second permanent partial disability is to have his compensation adjusted according to the combined effect of his injuries and that combined effect is to still leave him classified as permanently partially disabled, his second award must be made in view of "his past receipt of money under this act," and the appellant in this case, having received $625 for his first injury, was entitled to no more than the difference between that and the maximum of $1,500 for his second injury.

The decisions of the commission and the lower court are affirmed.

Holcomb, C. J., and Main, Mitchell, and Tolman, JJ., concur.

SUPREME COURT OF WASHINGTON.

FREYMAN

v.

DAY ET AL. (No. 15326.)*

1. EVIDENCE—PRESUMPTION—FOREIGN LAW.

In the absence of pleading and proof to the contrary, it will be presumed that the laws of Idaho are the same as those of this state.

(For other cases, see Evidence, Dec. Dig. § 80[1].)

2. EVIDENCE—PRESUMPTIONS—LAWS OF OTHER STATES —WORKMEN'S COMPENSATION—INJURY IN FOREIGN STATE.

An employee injured in another state under circumstances which would have confined his recovery to workmen's compensation proceedings if the accident had happened in this state cannot maintain a damage action without pleading the foreign law, since it will be presumed the foreign law corresponds with that of this state in the absence of a contrary showing.

(For other cases, see Evidence, Dec. Dig. § 80[1].)

Department 1.

Appeal from Superior Court, Spokane County; D. W. Hurn, Judge.

Action by August Freyman against Harry L. Day and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Eugene R. Childe, of Seattle, for appellant.

*Decision rendered, Aug. 5, 1919. 182 Pac. Rep. 940.

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John H. Wourms, of Wallace, Idaho, and Plummer & Lavin, of Spokane, for respondents.

MAIN, J. The purpose of this action was to recover damages for personal injuries alleged to be due to the negligence of the defendant. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff. The defendants made a motion for judgment notwithstanding the verdict, which was sustained, and a judgment was entered dismissing the action. From this judgment the plaintiff appeals.

[1] The respondents are copartners operating a mine near the town of Burke in the state of Idaho. On the 3d day of July, 1917, the appellant, while employed in the mine, sustained the injuries on account of which he instituted this action. The action was brought in the superior court of Spokane county in this state. There was no pleading or proof as to what the laws of Idaho were relative to accidents of this character. In the absence of such pleading and proof it will be presumed that the laws of Idaho are the same as the laws of this state.

[2] In this state there is a law known as the Workmen's Compensation Act (3 Rem. & Bal. Code, c. 7), wherein it is provided that relief to workmen for injuries occurring in extrahazardous work are withdrawn from private controversy. In section 2 of the act work in mines is specified as extrahazardous. In section 8 of the act, as originally passed, there was preserved a right of action against an employer who had defaulted in any payment that he was required to make under the act, to the accident fund. In 1917 (Laws of 1917, c. 120, § 5), the section of the original act giving a right of action against a defaulting employer was amended. In the amended section the right of action against a defaulting employer by the injured employee was not preserved. Other means were provided by which compulsory payment could be made to the accident fund. This amendment was in full force and effect at the time the appellant's accident occurred.

It thus appears that had the appellant sustained the injuries for which he complains, in this state, he would have no right to wage a law action for the recovery of damages, but would be required to take compensation provided for in the Workmen's Compensation Act. It follows therefore that since there was no pleading or proof as to the laws of Idaho, in the absence of which the law of that state will be presumed to be the same as this, the appellant could not maintain this action for the recovery of damages. It must be remembered that the accident in this case did not happen in interstate commerce, and consequently would not come within the provisions of the statute covering that subject-matter.

The judgment will be affirmed.

Holcomb, C. J., and Tolman, Mackintosh, and Mitchell, JJ., concur.

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SUPREME COURT OF WASHINGTON.

LUND

v.

GRIFFITHS & SPRAGUE STEVEDORING CO. (No. 15318.)*

1. ADMIRALTY — JURISDICTION—MARITIME INJURIES — WORKMEN'S COMPENSATION.

Amendment to Judiciary Act Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 991[3],1233) giving federal courts jurisdiction over all civil causes of admiralty and maritim jurisdiction, saving to claimants the rights and remedies under the Workmen's Compensation Law of any state, does not abolish admiralty or common-law remedies, for maritime injuries, but merely gives injured employe additional remedy of state compensation act, where it affords a remedy.

(For other cases, see Insurance Dec. Dig. § 20).

2. ADMIRALTY—JURISDICTION—TORTS—INJURIES TO STEVEDORE—WORKMEN'S COMPENSATION.

Stevedore injured in hold of steamship may sue employer at common law notwithstanding amendment to federal Judiciary Act of Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 991[3], 1233), giving federal courts jurisdiction over all civil causes of admiralty and maritime jurisdiction and saving to claimants the rights and remedies under the Workmen's Compensation Act of any state, the Workmen's Compensation Act of this state being inapplicable to such injury.

(For other cases, see Admiralty, Dec. Dig. § 20.)

Department 2.
Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by John A. Lund against the Coastwise Steamship & Barge Company, Incorporated, and the Griffiths & Sprague Stevedoring Company. Judgment for plaintiff against last-named defendant, and last named defendant appeals. Affirmed.

Grinstead & Laube and Trefethen & Findley, all of Seattle, for appellant.
Walter S. Fulton, of Seattle, for respondent.

FULLERTON, J. The respondent was injured while in the employ of the appellant working as a stevedore in the hold of the Steamship Anyox. The vessel named was the property of the defendant Coastwise Steamship & Barge Company, Incorporated, who was using it in the lumber trade. Being desirous of taking on a cargo of lumber at Seattle, it engaged the appellant, a stevedoring company, to load the vessel. A part of the equipment of the vessel consisted of two steam winches, sufficiently close together to be operated by a single winch driver. The winches were controlled by levers, so arranged that the winch driver could stand between them and operate a winch with each hand. When on center the ends of the levers intended to be gripped by the hands reached to the height of the hands of an ordinary man while standing, and the movement of a partcular lever up or down caused the winch which it controlled to haul in or play out the line to which the

*Decision rendered, Aug. 12, 1919. 183 Pac. Rep. 123.

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lumber was attached while being carried from the wharf to the vessel. In loading the vessel at the time in question it was found necessary to use the winches. As a winch driver the appellants employed one A. B. Anderson. Anderson was a winch driver of long experience, and no question is raised as to his competency. The accident giving rise to the injury to the respondent happened when the first winch load of lumber was brought on board the vessel. This consisted of a square piece of timber weighing several hundred pounds. It was carried successfully from its place on the wharf to the deck of the vessel, and lowered partially into the hold. Just before being dropped on the floor of the vessel, Anderson in some manner lost control of the winches. He was unable to make them operate in unison, and the result was that the timber swung crosswise of the hold. In one of its vibrations it caught the respondent, crushing his leg against some part of the vessel, seriously and permanently injuring it.

The respondent brought this action against both the owner of the vessel and the appellant, who was employed to load it. As grounds of negligence he charged that the winches were defective in two particulars: First, that the winches were not adapted to the weight of the timber then being loaded in that they were too touchy because of having an eccentric with only one quarter inch play, when to have been reasonably safe the eccentric should have had at least an inch play; and, second, that the defendants were negligent and careless in the maintenance of the winches, in that they had thereon spiral springs, intended to keep the levers thereof on center, but which were so constructed as to prevent the levers from being easily and readily operated by the driver of the winches, thereby making it impossible for such driver to control the winches; further alleging that the injury to him was the result of the negligence of the defendants in the respects mentioned.

The defendant first demurred to the complaint, and, after the overruling thereof by the trial court, answered, denying generally the allegations of negligence contained in the complaint, and pleading affirmatively contributory negligence, and that the accident was the result of negligence of a fellow servant of the respondent. The issues were submitted to the jury against both of the defendants, and resulted in a finding favor of the defendant owner, and a finding against the appellant in the sum of $10,300. The trial court, on the contention that the verdict was excessive, offered the respondent the alternative of accepting a judgment for $6,300 or of submitting to a new trial. The respondent accepted the first branch of the alternative proposed, and judgment against the appellant was entered in his favor in the last sum named. The appeal is from the judgment entered.

The appellant first assigns error on the order of the trial court overruling its demurrer to the complaint. Among the grounds of demurrer was the ground of want of jurisdiction over the subject-matter of the action, the more particular contention being that such subject-matter was withdrawn from private controversy by the Workmen's Compensation Act. It is conceded that this court held in the case of Shaughnessy v. Northland Steamship Co., 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B, 655, that the act referred to does not bar an action of this sort, founded as it is upon a maritime tort, but it is contended that the decision is rendered inoperative by the amendment to the federal judiciary act of October 6, 1917 (c. 97, 40 Stat.. 395 [U. S. Comp. St. §§ 991 (3) 1233]). The act prior to its amendment vested in the federal courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it." The amendment added to the saving clause the sentence, "And to claimants the rights and remedies undern the workmen's compensation law of any state." The argument is that the effect of the amendment is to establish the jurisdiction of state workmen's compensation acts over personal injuries to workmen occurring on board

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ships, and that since our act makes the remedy exclusive in all instances where jurisdiction is given, it must follow that an injured workmen cannot in this state resort to any other remedy.

[1, 2] But it will be observed that the federal act does not purport to abolish the admiralty or common-law remedies for maritime injuries. On the contrary, it still maintains these remedies in favor of an injured employe, and gives to him the additional remedy of the state compensation acts where such acts afford a remedy. But it is plain we think that our workmen's compensation act does not afford such a remedy. As we held in the case cited, the act was intended to be mutual in its operation, protecting employers of labor in certain enumerated employments, on the one side, from actions in courts of law for personal injuries, and giving to a workmen injured while engaged in the enumerated employments, on the other a certain and sure relief for his injury, regardless of the manner in which the injury occurred, or to whose fault it might be charged, and was intended to operate only in those instances which are within the exclusive legislative control of the state. It must follow, we think, that the amendment cited has no effect upon the Workmen's Compensation Act of this state, or the remedies afforded thereby, however effective it may be in other states having a different system for relief in this regard. In the case of Puget Sound Bridge & Dredging Company v. Industrial Insurance Commission, 177 Pac. 788, decided since this appeal was taken, we held that the commission was not entitled to collect premiums for the industrial fund for the employes of the company whose work was confined exclusively to the company's dredges; this for the reason that the Workmen's Compensation Act did not afford their protection against actions for injuries received by such workmen. In the course of the opinion the amendment to the federal judiciary act was noticed, and it was held that it did not change the rule as formerly announced by this court. The case is in point on the question here presented. If the act does not so far operate against employers as to compell them to pay the premiums required by the act intended for the benefit of the injured workmen, clearly it will not protect them from the remedies the act leaves open to the injured workmen. It follows that the trial court correctly determined that the action will lie.

[3,4] A second ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. In this court it is urged that the complaint is fatally defective because it is not alleged that the appellant had notice or knowledge of the defect in the winches. But the allegation was unnecessary. A distinction exists in this respect between instances where the machinery is defective when furnished for use and machinery which is in good condition when furnished, but afterwards by use or other causes becomes defective while in the hands of the servant. It being the positive duty of the master to furnish his servants with reasonably safe appliances with which to do their work, it is sufficient, in an action to recover for a breach of this primary duty, to allege facts which show the duty, and its breach; it is not necessary to go farther and specifically allege that the master knew, or by reasonable diligence would have known, that he had breached his duty. As we said in McLeod v. Chicago, Milwaukee, etc., R. Co., 65 Wash. 62, 117, Pac. 749:

"When the act is such that it must, in the nature of things, make unsafe the servant's place of work, knowledge of that fact must of necessity be inferred from pleading the act. The principle contended for by appellant arises more frequently in connection with the duty to inspect and remedy defects than in any other class of cases. It would seem to be an application of a sound principle in an unsound way to invoke this rule strickly in a case such as here presented. Even where the primary negligence is the failure to inspect, provide, and maintain a safe place, the knowledge of the master, when it may be inferred from the facts pleaded, is sufficiently pleaded as against demurrer. Gibson v. Chicago,

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M. & P. S. R. Co., 61 Wash. 639, 112 Pac. 919. 'Such knowledge by the defendant is generally regarded as sufficiently averred by an allegation that the defendant negligently permitted appliances to become defective and negligently suffered them to remain in a defective condition.' 6 Thompson, Negligence, p. 551, § 7529."

The principle is illustrated also by the case of Kidwell v. Houston. etc., R. Co., 3 Woods, 313, Fed. Cas. No. 7,757, where it was held that a servant of a railway company suing for injuries caused by a defective car must allege, either that the car was defective when placed on the track, or that it afterwards became defective, and that the railroad company had knowledge thereof.

[5, 6] It is next contended that there was no proof that the appellant had notice that the winches were defective. The proofs followed the allegations of the complaint. There was evidence which tended to show structural defects in the winches, defects which if not discoverable by mere inspection were readily discoverable by putting the winches into actual service. It was the province of the jury to believe this evidence, and if they did so believe it they were warranted in believing that the appellant could, by the exercise of reasonable diligence, have known of the defects.

"Where the defect in the appliance is shown to be structural, and is of such a character as renders it unsafe, it may be inferred that the employer was aware of the defect, and an employe who has been injured by such an appliance need not show that the master knew that it was defective." 26 Cyc. 1144.

[7] In the complaint it is alleged 'that one of the defects in the winches was insufficient play in the eccentrics, making the winches difficult of control, and thereby rendering them unsafe. The witnesses for the respondent, including the winch driver himself, described the defect as a defect in the eccentric, while it apppears elsewhere in their testimony that another part of the machine, namely, the throttle valves, was intended to be described. These, according to the witnesses, were so constructed that a too slight movement of the levers would cause the winches to reverse, making it difficult for the driver of the winches to control them. It is urged that this is such a fatal variance between the allegations and the proofs as to entitle the appellant to a reversal. But we cannot so conclude. A mere variance between the allegations and the proofs is not sufficient in all instances to warrant a reversal. By the express provisions of the Code (Rem. § 299) a variance between the allegations and the proofs is immaterial unless it shall have actually misled the adverse party to his prejudice in maintaining his defense upon the merits. It is only where there is a failure to prove the allegations of the complaint "in its entire scope and meaning" (Ida. § 301), that such a result follows. In this instance there was no contention in the court below that the defendant was misled to his prejudice by this difference between the allegations and the proofs, and certainly it is not a failure to prove a cause of action in its entire scope and meaning to allege that an appliance is defective because of a defect in one of its parts, and prove that it is defective because of a defect in a part other than the part alleged.

[8] A further contention in this connection is that there is no evidence showing that the winches were defective. The evidence on this question we have examined with some care, and we are convinced that the weight of the evidence is with the conclusion that the winches were not defective; that while they differed somewhat in construction from winches in more common use they were reasonably safe when operated by a winch driver familiar with these differences; and, further, that the injury to the respondent in this instance was caused rather by the driver's unfamilarity with the working of the winches than by any defect, structural or otherwise, in the winches themselves. But there is evidence the other way. Experienced winch drivers testified

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in substance that these differences were radical, rendering the winches "touchy," and unsafe in the hands of any driver, however skilled or familar with them he might be. There was therefore such a conflict in the evidence as to make the question one for the jury to determine; and since they determined the conflict in favor of the respondent, this court, notwithstanding it may believe they were in error, has no authority to interfere.

[9, 11] Another contention is that the verdict in favor of the owner of the vessel operates as a release of the appellant. It is argured that the appellant was a mere agent of the owner for the loading of the boat and is not liable while it was acting within the scope of the agency unless the principal is also liable. It is undoubtedly the rule that an intermediate servant is not liable for a negligent injury to a subordinate servant where he is guilty of no independent wrong and is but carrying out the directions of the common master. But the record here shows something more than this. The appellant was an independent contractor. Its contract was entire. It undertook to load the boat, employing its own means and its own servants. For any negligent injury to its servants it is liable, regardless of the question whether another party may be also liable. It is true that the winches which caused the particular injury where a part of the equipment of the boat, in place when the appellant entered into its contract. But they were nevertheless, as between the appellant and its servants, appliances furnished by the appellants to its servants with which to work, and the appellant owed the servant the same duty to see that they were in proper condition that it would have owed them had it procured the winches from some other source. It may be true also that the verdict of the jury in the light of the evidence is inconsistent—that there is no apparent reason why they should have found against one defendant and in favor of the other—but this, while it might be grounds for some other form of relief, is not a ground for holding the verdict equivalent to a verdict in favor of both defendants.

[12] The appellant requested an instruction to the jury touching the degree of care required of a master when furnishing appliances for the use of its servants. The court did not give the instruction in the language of the appellant, but gave it in substance in its own language. This was sufficient. In this state the trial court may give a requested instruction in his own language, however appropriate may be the language in which the request is framed.. We are aware that the appellant contends that it was excludeed from the benefits of the instruction, as it was limited in terms to its codefendant. As the instruction given is quoted in the appellant's brief, it is faulty in the respect claimed, but an examination of the instruction, as certified to this court, shows that the appellant has not accurately quoted it. The concluding clause of the instruction as the appellant quotes it reads, "Then the steamship company would not be chargeable with negligence," whereas the certified copy reads, "Then neither the steamship company nor the stevedore company would be chargeable with negligence."

[13] Finally, it is contended that the verdict even as reduced by the trial court is excessive. The amount of the recovery allowed is substantial, but the respondent's injuries were severe and permanent. The timber struck the respondent's leg at the juncture of the middle and lower thirds. The bones were crushed and splintered, and a jagged hole made in the flesh through which the bones protruded. Great difficulty was had in getting the bones to unite, and when they did unite the leg was crooked, so much so that the weight of the body no longer rests in a vertical direction upon the leg, causing pain in ankle joint when use is made of it. The respondent was a stevedore by occupation when injured, capable of earning, and actually earning, substantial wages. His injury unfits him for this occupation, and he must seek some other

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means of earning a livelihood. In the light of these conditions we cannot think a further reduction in the recovery would be justified.

The judgment is affirmed.

Holcomb, C. J., and Parker and Mount, JJ., concur.

SUPREME COURT OF WASHINGTON.

PARKER
v.
INDUSTRIAL INSURANCE DEPARTMENT. (No. 15118.)*

MASTER AND SERVANT — WORKMEN'S COMPENSATION — JUDGMENT ON REMITTITUR.

A judgment entered upon the going down of a remittitur from the Supreme Court, that defendant Industrial Insurance Department make such an order for compensation to plaintiff employee "as will reasonably cover the difference in the wage-earning power of said plaintiff," *held* to require that award to employee should be in the proportion which the new earning power should bear to the old, as provided in Rem. Code 1915, § 6604—5d, and not that award should be for the full difference between the old and new earning power.

(For other cases, see Master and Servant, Dec. Dig. § 418[7].)

Department 2.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Proceedings by Harry C. Parker under the Workmen's Compensation Act (Laws 1911, p. 345 [Rem. Code. 1915, § 6604—1 et seq.]) for compensation for injuries, opposed by the Industrial Insurance Department. From judgment entered upon going down of remittitur on decision reported in 102 Wash. 54, 172 Pac. 830, the Industrial Insurance Department appeals. Affirmed.

W. W. Tanner and D. E. Twitchell, both of Olympia, for appellant.
Turner, Nuzum & Nuzum, of Spokane, for respondent.

PARKER, J. This is an appeal by the Industrial Insurance Department from the judgment of the superior court for Spokane county, entered in this case upon the going down of the remittitur from our decision rendered herein, modifying the judgment of that court; our decision being reported in 102 Wash. 54, 172 Pac. 830. The contention here made in behalf of the department is that the judgment of the superior court is not such as was directed by this court to be entered in the case.

The concluding language of our decision upon which the clerk of this court entered formal judgment, is as follows:

"It seems to us that the law makes provision for a case like this. 'As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the *pay-*

* Decision rendered, Aug. 13, 1919. 183 Pac. Rep. 82.

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ments shall continue in the proportion which the new earning power shall bear to the old.' Rem. Code, § 6604—5d.

"Instead of cutting off respondent's allowance altogether, the department should have made an order covering this difference between the present earning capacity of the respondent and his former earning capacity. Considering, then, the spirit of the law, that an injured workman in extrahazardous employment shall have 'a sure and certain recovery,' and the letter of the law as we conceive it to be, the case will be remanded to the superior court to be from thence transmitted to the department, with directions to make such an order as will reasonably cover the difference in the wage-earning power of the respondent. It is so ordered."

We have italicized the portion of the statute quoted and made a part of our decision, to be particularly noticed. The formal judgment of this court entered by the clerk and embodied in the remittitur, directed the superior court "to modify its judgment so that respondent will recover the difference in his wage-earning power." Upon the going down of the remittitur, the superior court entered its judgment, which, in so far as we need here notice its language, reads as follows:

"It is further ordered, adjudged, and decreed that defendant (insurance department) make such an order for compensation to the plaintiff herein, Harry C. Parker, as will reasonably cover the difference in the wage-earning power of said plaintiff."

This appeal seems to have been prompted by a fear on the part of the department that the judgment rendered by the superior court must be construed as compelling the awarding to respondent of the full amount of the difference between his former and present earning power; that is, for instances, if his former earning power was $4 per day and his present earning power is $3 per day, that he must be awarded the full difference of $1 per day. Looking alone to the language of the judgment of the superior court, there may be some reason for contending that such is its meaning, and that it is not in exact accord with the directions of this court, though it is in almost the exact language of the remittitur and the concluding few words of our decision. But we think that neither our decision, the remittitur, nor the judgment of the superior court, read in the light of the italicized portion of the statute quoted in and made part of our decision, means anything more than that the award to respondent shall be "in proportion which the new earning power shall bear to the old,' and not that the award shall necessarily be for the full difference between the old and new earning power. While the language of the judgment of the superior court, of the remittitur, and of the concluding few words of our decision might have been more precise in this particular, we think it plain that all means no more than this. So construed, the judgment of the superior court is as directed by this court to be entered.

The judgment is affirmed.

Holcomb, C. J., and Fullerton, Mount, and Bridges, JJ., concur.

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SUPREME COURT OF WASHINGTON.

TALBOT

v.

INDUSTRIAL INSURANCE COMMISSION. (No. 15116.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —ALLOWANCE INCREASED BY AMENDMENT—RETROACTIVE EFFECT.

Where an employee in an extrahazardous occupation was injured before the going into effect of Laws 1917, p. 78, amending the Workmen's Compensation Act (Rem. Code 1915, § 6604-5, par. "b"), by providing that in case of total permanent disability, if the workman is rendered physically helpless so as to require a constant attendant, the monthly payment (of from $20 to $35 a month) shall be increased $20 per month so long as the requirement shall continue, an allowance to the workman commencing as of the date of the amendment's taking effect, and to continue so long as he should require an attendant, did not give the amendment a retroactive effect contrary to the legislative intent.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

Department 2.

Appeal from Superior Court, Clallam County; John M. Ralston, Judge.

Claim by F. O. Talbot, an injured employee, for increased allowance under the Workmen's Compensation Act because of his permanent disability, etc., against the Industrial Insurance Commission. From a judgment reversing a decision of the Commission, rejecting and disallowing the claim, the Commission appeals. Affirmed.

W. V. Tanner and D. E. Twitchell, both of Olympia, and G. H. Bucey, of Tacoma, for appellant.

Donworth, Todd & Higgins, of Seattle, for respondent.

PARKER, J. This is an appeal by the Industrial Insurance Commission from a judgment of the superior court for Clallam county reversing a decision of the commission which rejected and disallowed the claim of F. O. Talbot, made for an increased allowance because of his permanent disability and of his being so physically helpless as to require the constant services of an attendant.

The controlling facts are not in dispute, and may be summarized as follows: On May 12, 1917, Talbot was injured while employed in an extrahazardous occupation. His case was classified by the commission as one of "permanent total disability." The commission awarded him an allowance of $20 per month. Talbot's injuries were such that is, and has been at all times since he was injured, not only totally disabled, in the sense that his earning power is entirely destroyed, but he has been at all times since he was injured "so physically helpless as to require the services of a constant attendant"; and this he claims entitles him to an increased allowance of $20 per month so long as such requirement shall continue, resting his claim upon the conceded facts as to his condition and the provisions of chapter 28, Laws of 1917, amending the Workmen's Compensation Act.

On May 12, 1917, at the time Talbot was injured, the Workmen's

* Decision rendered, Aug. 12, 1919. 183 Pac. Rep. 84.

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Compensation Act as then in force (paragraph "b," § 6604—5, Rem. Code) fixed the compensation for injured workmen in cases of "permanent total disability" at a minimum of $20 per month and a maximum of $35 per month. The award of $20 per month and the refusal to award an increased monthly allowance, as claimed by Talbot, was rested by the commission upon the theory that the law as existing at the time he was injured is the only law controlling the amount of monthly allowance he is entitled to. The Legislature of 1917 amended that paragraph by adding thereto the following:

"In case of total permanent disability, if the character of the injury is such as to render the workman so physically helpless as to require the services of a constant attendant, the monthly payment to such workman shall be increased twenty dollars ($20.00) per month so long as such requirement shall continue. * * *" Laws of 1917, p. 78.

The increased award so provided in the amendment is subject to certain exceptions, which is not necessary to here notice. This amendment went into force June 6, 1917, after Talbot had received his injuries.

Counsel for the commission, while conceding that Talbot's condition is, and has been since he was injured, such as to bring his case under the amendment of 1917, if he had been injured after the going into force of the amendment, contends that his case does not come under the amendment because of his injury occurring before the amendment went into force. The argument is, in substance, that to award him such increased allowance would be to give the amendment a retroactive effect, and that there is nothing in the amendatory act suggesting any such legislative intent. We may concede for argument's sake that to award Talbot such increased allowance for any time he was in a helpless condition prior to the going into effect of the amendment would be to give it a retroactive effect, contrary to the intent of the Legislature. The trial court reversing the commission's refusal to award the claimed increased allowance, decided that Talbot was entitled thereto, but only from the date of the going into effect of the amendment, and directed the commission to make such allowance, commencing as of that date, and continue the same "so long as the plaintiff by reason of his said injuries shall require the services of a constant attendant." We are of the opinion that this is not the giving to the amendment a retroactive effect, contrary to the intention of the Legislature. The power of the Legislature to provide for such an increased monthly allowance in such cases is not questioned by counsel for the commission, the only question here presented being as to the legislative intent in enacting the amendment.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

Holcomb, C. J., and Fullerton, Mount, and Bridges, JJ., concur.

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SUPREME COURT OF WASHINGTON.

ARCHIBALD

v.

NORTHERN PAC. R. CO. ET AL. (No. 15256.)*

1. MASTER AND SERVANT—EMPLOYER'S LIABILITY—VARIANCE.

Where a complaint pleaded a cause of action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and proof showed that plaintiff was not engaged in interstate commerce, but established a case under Laws 1917, p. 96, § 19, making the provisions of the federal act applicable to certain accidents in intrastate commerce, there was no variance or failure of proof requiring dismissal of the complaint.

(For other cases, see Master and Servant, Dec. Dig. § 264[10].)

4. STATUTES—TITLE — SUFFICIENCY — INJURY TO SERVANTS.

Laws 1917, p. 76, entitled "An act relating to the compensation * * * of injured workmen," etc., and providing in section 19 that the liabilities and defenses prescribed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) should apply to certain workmen injured in intrastate commerce, does not violate Const. art. 2, § 19, requring bills to embrace only one subject to be expressed in the title.

(For other cases, see Statutes, Dec. Dig. § 117[2].)

5. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS —EMPLOYER'S LIABILITY.

Laws 1917, p. 96. § 19, making the provisions of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) applicable to railroads engaged in both interstate and intrastate commerce, does not deny equal protection of the laws in violation of Fourteenth Amendment to the federal Constitution, in that it discriminates against employees of purely intrastate carriers.

(For other cases, see Constitutional Law, Dec. Dig. § 245.)

Department 1.

Appeal from Superior Court, Spokane County; D. H. Carey, Judge.

Action by M. D. Archibald against the Northern Pacific Railroad Company a d others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Plummer & Lavin, of Spokane, for appellant.

Cannon & Ferris and F. J. McKevitt, all of Spokane, for respondents.

MACKINTOSH, J. For a period of 16 months the appellant had been employed in the repair shop of the respondent as a machinist's helper, and while so employed, one afternoon about 4 o'clock, he was assisting one Johnston, a machinist, in shaping a forgoing to be fitted upon an engine frame. In order to properly perform this work, Johnston was chiseling the forgoing, having marked it where it was to be chipped,

*Decision rendered, Aug. 6, 1919. 183 Pac. Rep. 95.

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and having set it in a vise. The tools used were the ordinary cold chisel and hammer. While Johnston was chiseling, the appellant was standing at Johnston's right, holding a torch in his right hand to enable Johnston to see the work he was engaged upon. At the time this particular work had been commenced, Johnston had warned the appellant of the danger to his eyes from flying particles of steel, and had told him to keep his eyes covered with one hand while holding the torch with the other. The appellant had heeded this warning by keeping the gloved left hand over his eyes. When the work had progressed for 15 or 20 minutes, and had arrived at a point where the forgoing was to be chipped back, it became necessary for Johnston and the appellant to change places. Johnston ordered the appellant to shift his position so as to pass to Johnston's left side, and while getting into this position he changed, or was in the act of changing, the torch to his left hand, and Johnston, in the meantime, having recommenced his work from his new position, in striking the chisel caused a flying piece of steel to become lodged in the appellant's eye; this being the injury for which the action was commenced.

The allegations of negligence state that Johnston, without warning to the appellant and while he was changing his position as he had been directed to, and changing the torch as it became necessary by reason of the changed position, carelessly struck the chisel before the appellant had an opportunity to change the torch and thus free his right hand so that it might be used in protecting his eyes. A nonsuit having been granted, appellant is here and presents four questions for decision.

[1] 1. The complaint pleads a case of action under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), and contains no statement under separate and distinct counts under the state law. By the enactment of the Legislature of 1917, contained in chapter 28, § 19, the appellant and respondent have the same rights and are under the same liabilities and are subject to the same rules of evidence and the same defenses, whether the action be prosecuted under the federal Employers' Liability Act or the state law has established the same rules of evidence and procedure for actions against carriers engaged in both interstate and intrastate commerce as is provided by the federal Employers' Liability Act in the case of interstate carriers. The complaint in this case made allegations that at the time of the injury the respondent was engaged in interstate commerce, but the proof failed to establish this fact, and the appellant now tacitly admits that he did not bring himself within the provisions of the federal Employers' Liability Act. The respondent's claim is that the appellant, having elected to sue under the federal act, was not entitled to have his case go to the jury when he failed to prove that he came within the operation of that act, although the testimony established a cause of action under the state laws. The complaint was drawn broadly enough to entitle the plaintiff to relief under the federal Employers' Liability Act, and by its terms it was drawn under that act; there being no separate cause of action alleged under the state act. There is no question of the respondent having lost any right it may have had to move the case to the federal court for trial. All the proof introduced was equally material and proper to establish a cause of action under either the federal or the state law, and under both laws the respondent was entitled to and limited to the same defenses. The appellant failed to satisfactorily prove that he was such employee as was protected by the federal act, but did establish by his proof that he was such an employee as was protected by the state act. This situation presents squarely for our determination the question of whether such conditions constitute a variance and failure of proof, warranting the dismissal of the action.

In Baird v. Northern Pacific Railway, 78 Wash. 68, 138 Pac. 325, this court had under consideration a question very similar to this. There was a cause of action stated under both the federal act and common

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law, and the parties had treated it, however, as a common-law action; and while different issues and defenses were possible under the federal act and at common law, yet the court said:

"There is no decision, so far as we are advised, which holds that, where a complaint states facts sufficient to show a liability at common law, proof admissible thereunder should be excluded on the ground of variance merely because the complaint also alleges that the railroad company was engaged in interstate commerce, and that the injured person was, at the time of the injury, engaged in work in aid of such commerce."

And further in the same case:

"Obviously, if, as held in the last-quoted decision [Jones v. Chesapeake & Ohio Ry. Co., 149 Ky. 566 (149 S. W. 951)], the federal act did not repeal, but only superseded, the common law in a proper case, then, in a case such as here presented, where both the complaint and proof showed that the appellant was not, at the time of his injury, engaged in any act connected with interstate commerce, but did state facts sufficient to show a right of recovery under the common law, it would have been positive error not to submit the case to the jury upon that theory."

The reasoning of the Baird Case, applied to the facts of the case at bar, must lead to the conclusion that where, under the federal act and state law, the parties stand in exactly the same relation to each other and an action between them is subject to the same rules, under a complaint broad enough to cover both laws, the plaintiff is entitled to have his case proceed, if there is sufficient proof to entitle him to recovery under either the act or the state law, notwithstanding the fact that his complaint may have indicated that it was based on the federal act.

Corbett v. Boston & Maine Railroad, 219 Mass. 351, 107 N. E. 60, although it relates to two concurrent actions brought under the federal act and under the Massachusetts act, contains reasoning that is apropos to our discussion:

"It [the federal act] does not undertake to affect the force of the state statute in its appropriate sphere. The state law is as supreme and exclusive in its application to intrastate commerce as is the federal law to interstate commerce. If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the federal law; if in the latter service, such liability rests wholly upon the state law. * * * The facts and not the pleadings determine whether the wrong done in any given case confers a right to recover under the federal or state statute. The allegations in the plaintiff's declarations in these two actions do not constitute the test whether the jurisdiction of the court is under the federal or state statute. These simply are the basis for a judicial inquiry into the facts, which alone can determine that question. It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound, so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril. * * * This rule has been followed frequently in actions where it was doubtful whether the remedy of the plaintiff was under our Employers' Liability Act or at common law. * * * It is equally applicable to the cases at bar. The principle is not changed in any material respect because the question relates to remedies afforded by the statutes of different sovereign powers, each exclusive within its own domain. The relief is sought in the same forum, for the state court has jurisdiction of the cause of action, whichever statute may be controlling. * * *

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There are strong practical considerations in the administration of justice which lead to the same result. It oftentimes would be a great hardship upon the parties to compel them to try out first the question whether the federal act applies, and, if it in the end shall be decided that it does not, then to test by further litigation their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of error in the form of relief sought, he thus might be barred from just recovery. Although both the federal and state statutes as to amendments are liberal, * * * and are liberally interpreted in cases of this sort, * * * nevertheless, the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf.

"The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. * * * Whether a railroad employee is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety, about which even the justices of the highest court are not in harmony. * * * It would be a saving of expense both to the parties and to the commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all the phases than to require two distinct and successive inquiries before separate tribunals, where only a single aspect of the incident could be open to investigation at one time.

If the court in that case was justified in concluding that two independent actions could properly be presented as one, then in this case we may hold that in one action the entire question may be tried out and the case submitted to the jury's consideration as being under the act which the proof shows is applicable to the situation.

Bravis v. Chicago, M. & St. P. Ry., 217 Fed. 234, 133 C. C. A. 228, cited by the respondent, holds:

"It is said that the complaint, after its amendment, stated a good cause of action under the state and also under the federal Employers' Liability Act, and it is insisted in view of that fact that the court erred in directing the verdict. This case does not present a complaint where, in separate counts, a cause of action is pleaded under the federal act and another under the state law, and no election is made, and we do not determine the effect of a motion for a directed verdict in such a case. It presents a case where the plaintiff at the close of his own case so amended his complaint, which stated in a single count a cause of action under the state law, as to make it state a cause of action under the federal Employers' Liability Act. The plaintiff thereby elected to abandon his cause of action under the state law and to insist upon a recovery under the federal act. The defendant then moved for a directed verdict, and the court could not lawfully escape the decision of the only question thus presented, the question whether or not the evidence sustained the cause of action which alone the plaintiff had then pleaded and on which he had elected to rely. There was no error in its decision of that issue, and the plaintiff was estopped from repudiating his election."

This case differs from the case at bar, in that the plaintiff, at the conclusion of his case, sought to amend his complaint so as to state a cause of action under the federal act, which was not sustained by his

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proof, and which amounted to an abandonment of the cause of action originally stated under the state law. Had the appellant in this case insisted that at the time of the injury he was engaged in interstate commerce, and relied for his recovery upon the evidence introduced to establish that fact, which evidence was not sufficient, the Bravis Case and the case at bar would be analogous.

Respondent has also cited the case of Louisville & N. R. Co. v. Stange's Adm'r, 156 Ky. 439, 161 S. W. 239, which contains a statement in support of the rule in the Baird Case:

"Where the parties themselves and the rights and liabilities of the parties are precisely the same under both the state law and the federal statute, there would doubtless be no good reason for requiring an election."

[2, 3] 2. It is also urged that the evidence was not sufficient to allow the case to go to the jury, irrespective of the law applicable, for the reason that the plaintiff's testimony established his assumption of risk. It is argued that the work being done was of a simple character, and the dangers incident to it were so open and apparent that the appellant must, as a matter of law, be held to have assumed the risk of injury as a part of this employment.

It may be true that the appellant should be held, as a person of ordinary intelligence and experience, to have appreciated the danger, but the negligence complained of was the negligence of Johnston and the appellant is not, as a matter of law, to be held to have assumed the risk of Johnston's negligence. The testimony shows that the appellant was following Johnston's instructions in changing his position, and that before he had a adequate opportunity to change that position and protect himself in the new position, Johnston, without warning, resumed the dangerous work. This presented a question of fact upon which the jury should have been allowed to pass, and this is true although the facts as testified to might have been materially different from those contained in the statement made by the appellant to the claim agent of the respondent soon after the injury. This presented a question of credibility within the province of the jury to decide.

Reed v. Dickinson (Iowa) 169 N. W. 673, was a case in its facts closely akin to this. The Iowa court in reversing a directed verdict said:

"It is apparent that plaintiff was injured while in the line of his employment, and while engaged in the very act which he was directed by defendant's foreman to do. Taking this record as it is before us, the jury might well find that the plaintiff had done the work assigned him in the usual and ordinary way. He had succeeded in loosening his end of the rail, and, while standing with his bar in the bolt hole waiting the action of his coemployee at the other end of the rail, the rail was suddenly turned with plaintiff's bar in the bolt hole, and the position of the bar changed by the act of turning. This threw it out of position, and injury resulted to the plaintiff. Plaintiff was waiting for the employee at the other end to signal him that he had secured a bar hold on the rail sufficiently strong to enable him to turn the rail free from its position and loosen it from the pile. The record shows that his coemployee, without giving the warning which the plaintiff had reason to expect, and which the employee was directed to give, and upon which plaintiff relied, suddenly jerked the rail loose, causing plaintiff's bar to strike him upon the head.

"The jury could well have found that the cause of the injury was the sudden and unexpected movement of the plaintiff's assistant in suddently jerking the rail loose without warning plaintiff that he was about to do so, and without warning plaintiff that the rail was in a position to be jerked at that end. It was said in Caverhill v. Boston & M. Ry. Co., reported in 77 N. H. 330, 91 Atl. 917, that whatever risks the deceased

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assumed as to the defendants' method of doing business, he did not assume the risk of injury from the negligence of another servant. For an injury so caused state statute expressly makes the employer liable. It was said by this court in Byram v. Ill. Cent. Ry., 172 Iowa, 631, 154 N. W. 1006, Ann. Cas. 1918A, 1067: 'It is clear that the plaintiff did not assume the risk arising out of the negligence of another employee; for this he could not anticipate or guard against.'"

In Cules v. Northern Pacific Railway, 177 Pac. 830, occurs this statement:

"When, therefore, the men agreed upon a line of action and proceeded with the work in pursuance of the agreement, any departure therefrom by any number of the workmen would be a negligent act, whether willfully or heedlessly performed, giving a workman injured thereby a right of action against them to recover for such injury; this on the principle that they failed to exercise that degree of care which ordinary prudence required of them under the given circumstances."

So here, when Johnston directed the appellant to change his position and resumed the dangerous acts before the appellant had placed himself in a position of safety, a question of fact was presented to the jury as to whether this was negligence upon Johnston's part.

[4] 3. Chapter 28, § 19, Session Laws 1917, which provides for a cause of action against carriers engaged in interstate and intrastate commerce in all cases where liability does not exist under the federal act, is a portion of a general act relating to the compensation of injured workmen and amending certain designated sections in the prior act on that subject. It is claimed by respondent that this section 19 is invalid for the reason that it relates to a subject not embraced in nor germane to that expressed in the title of the act, and is therefore in violation of section 19 of article 2 of the state Constitution:

"No bill shall embrace more than one subject and that shall be expressed in the title."

"As the Constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title." Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077.

"No elaborate statement of the subject of an act is necessary to meet the spirit of the Constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required." State ex rel. Seattle El. Co. v. Superior Ct., 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831.

"A title may be as broad as the Legislative sees fit to make it, and thereunder any specific legislation, as to any subject relating to the general matter thus broadly embraced in the title, sustained." Percival v. Cowychee, etc., Dist., 15 Wash. 480, 46 Pac. 1035.

In Thayer v. Snohomish Logging Co., 101 Wash. 458, 172 Pac. 552, there being a restrictive title, this court held:

"The language of an act should be construed in view of its title and lawful purposes, since the subject expressed in the title fixes a limit upon the scope of the act."

"The title of the act need not be an index to the body thereof, nor need it express in detail every phase of the subject which is dealt with by the act. The essential requirement is notice; and the title is sufficient if it gives reasonable notice of the subject legislated upon." Davis-Kaser Co. v. Col. Fire Ins. Co., 91 Wash. 383, 157 Pac. 870.

"This provision of the organic act above referred to was not intended to require details and particulars to be stated in the title of acts."

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State ex rel. G. N. R. Co. v. Superior Court, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793.

"It is enough if it indicates to an inquiring mind the scope and purpose of the law. The title may be general and all matters incidental or germane thereto." State v. Asotin County, 79 Wash. 634, 140 Pac. 914.

"The mention of a given subject in the title is notice of all things germane to that subject found in the act." Cawsey v. Brickey, 82 Wash. 653, 144 Pac. 938.

This, being an act relating to the compensation of injured workmen, is comprehensive enough to include all manner of compensation for such workmen and all the means by which such compensation may be obtained. The title does not indicate that the only compensation provided for is that which is obtained through industrial insurance, although we popularly speak of the act as an industrial insurance act. The act provides for compensation by industrial insurance in certain cases, and also provides for the obtaining of compensation by injured workmen from their employers by legal action, and in the section to which we are now confining our attention provides, among other things, the defenses available to such employers. Compensation being the purpose and general scope of the act, section 19 is certainly germane thereto.

The title to the original act "relating to the compensation of injured workmen" contained the additional phrase "abolishing the doctrine of negligence as a ground of recovery against employers." This court, in referring to the title, said in Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1918A, 358, Ann. Cas. 1915D, 154:

"The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry in the state, and the employment of the language further on in the title, 'abolishing the doctrine of negligence as a ground for recovery of damages against employers,' is indicative of the evil the act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained."

[5] 4. The fourth point raised is that the section in question violates section 1 of the Fourteenth Amendment of the federal Constitution, in that it denies the equal protection of the laws to a given class of employees.

The determination of whether legislative acts "deny to any person within its jurisdiction the equal protection of the laws" is fraught with considerable difficulty. From the nature of the case, it is impossible to formulate a general definition which will meet the individual situation as it arises. The Supreme Court of the United States, in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, encountering this difficulty, says:

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Commenting upon this quotation, Hannis Taylor, in his work on Due Process of Law, p. 49, § 20, remarks:

"In a word, the rule is that when a citizen of the United States, as such, complains that a fundamental right guaranteed by the clauses in question has been taken away, the court will ascertain in that particular case whether the right is an incident of national citizenship, and as such within its protection, or an incident of state citizenship, whose protec-

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tion belongs to the state alone. If it appears that the right claimed is an incident of national citizenship, then the ultimate question arising is whether or no that right as protected by the amendment has been actually taken away by state action, executive, legislative, or judicial. The natural and inevitable tendency always impelling the court to narrow rather than extend its jurisdiction arises out of the principle of self-preservation. After stating that so long as the due process of law clause was only a part of the Fifth Amendment it 'has rarely been invoked in the judicial forum, or the more enlarged theater of public discussion,' attention was called to the fact, as early as 1878, that 'while it has been a part of the Constitution, as a restraint upon the power of the states, only a few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state Legislatures have deprived their citizens of life, liberty, or property without due process of law.' For the last 36 years the court has been applying its rule of inclusion and exclusion to the ever-rising tide of cases before it, and the result is a body of unique and profoundly important judicial literature which the author is now striving to condense and arrange in a more complete and systematic form than it has ever assumed before. This body of literature is unique because it embodies the result of an effort upon the part of the only court in the world's history ever endowed with such a power to annul national and state laws whenever they attempt to violate the rights of the national citizen as guaranteed by the national Constitution."

The respondent, in support of his argument that section 19 is class legislation, insists that the right to institute an action for personal injuries is given to persons engaged "in maintenance and operation of railways doing interstate, foreign and intrastate commerce, and in maintenance and construction of their equipment," and provides that such railroads shall, in actions against them, have available only such defenses as are available to interstate railroads or railroads engaged in interstate business under the federal Employers' Act, and that constitutes a discrimination between the rights possessed by employees of railroads such as logging, interurban, street. etc., for the reason that workmen engaged upon railroads doing purely an intrastate business are subject to the same hazards as those workmen engaged in similar occupations upon railroads within the act. In other words, that an arbitrary classification exists, while there is no substantial distinction between the classes of workmen.

"The equal protection of the laws means the protection of equal laws, but this equality of protection is not violated by classification, provided equal protection is afforded the members of each class. The power of the state to classify the objects of legislation is very broad. It is a matter of legislative discretion, and such classification will be upheld if it bears a reasonable relation to a proper object sought to be accomplished, even if it may appear unwise or unjust. The courts will not interfere with such classification unless the distinctions made are clearly arbitrary." Taylor, Due Process of Law, p. 725, § 458.

The Supreme Court of the United States had before it the Employers' Liability Law of Indiana in Louisville & Nashville R. R. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84:

"It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employees to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. * * * But, while conceding this, the argument is that classification of railroad employees for the purpose of the doctrine of fellow servant can only consistently with equality and uniform-

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ity embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations. The argument is thus stated. 'Plaintiff in error does not question the right of the Legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards, but it does insist that to make this a constitutional exercise of legislative power the liability of the railroads must be made to depend upon the character of the employment and not upon the character of the employer.' Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet as in operating railroads some employees are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employees are engaged in railroad work, the legislative authority is classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this, that by the operation of the equal protection clause of the Fourteenth Amendment the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for.' When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that, however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class."

See, also, St. Louis Cons. Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872.

Jeffrey v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364, contains the statement:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legisative authority. * * * That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the Legislature must be allowed a wide field of

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choice in determining the subject matter of its laws, what shall come within them, and what shall be excluded."

Volume 6 R. C. L. page 373 et seq., contains a full discussion of this subject, citing a multitude of authorities supporting the principles here stated.

In the decision of this court in passing upon the constitutionality of the Workmen's Compensation Act (Laws 1911, p. 345, State ex rel. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, a related question was considered:

"* * * It is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof.

"So, in this instance, if the Legislature believed that to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority."

Based on these authorities, it must follow that section 19 does not deny the equal protection of the laws to the class of employees as argued by respondent.

We reverse the judgment of the lower court, and remand the case for a new trial.

Holcomb, C. J., and Tolman, Main, and Mitchell, JJ., concur.

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UNITED STATES CIRCUIT COURT OF APPEALS.

FIRST CIRCUIT.

CAMUNAS ET AL.

v.

NEW YORK & P. R. S. S. CO. (No. 1369.)*

8. MASTER AND SERVANT—PORTO RICO WORKMEN'S COMPENSATION ACT—ELECTION BY EMPLOYER.

The Porto Rico Workmen's Accident and Compensation Act of February 25, 1918, which is obligatory upon employees and makes the public treasury liable to them for compensation, etc., *held* also compulsory as to employers.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Suit by the New York & Porto Rico Steamship Company against Manuel Camunas and others. Decree for plaintiff and defendants appeal. Reversed and remanded, with directions to dismiss the bill.

Edward S. Bailey, of Washington, D. C. (Howard L. Kern, of San Juan, Porto Rico, on the brief), for appellants.

Charles Hartzell, of San Juan, Porto Rico (Henry G. Molina, of San Juan, Porto Rico, on the brief), for appellee.

Before Johnson and Anderson, Circuit Judges, and Aldrich, District Judge.

ANDERSON, C. J. This is an appeal from a decree of the District Court of the United States for the District of Porto Rico, granting a permanent injunction restraining appellants, who constitute the Workmen's Relief Commission created by the act of the Legislature of Porto Rico approved February 25, 1918, known as the "Workmen's Accident and Compensaton Act," from requiring the plaintiff below to file any statement or report as provided in said act, and from assessing any quota or premium to be paid by plaintiff into the Workmen's relief trust fund created by said act, or in any manner enforcing any orders against the complainant, and also restraining the defendant, Benedicto, as treasurer of Porto Rico, from attaching any of the plaintiff's property or otherwise proceeding against the plaintiff for the recovery of the insurance premium assessed against the plaintiff under the terms of the Workmen's Compensation Act.

The plaintiff is a New York corporation, and the amount in controversy is alleged to exceed $3,000. The jurisdiction rests on diverse citizenship.

The bill was filed September 13, 1918. The plaintiff is a common carrier of freight and passengers between Porto Porto and the United States, and operates a pier in the harbor of San Juan, where it employs approximately 75 laborers, besides a number of other laborers in various other ports of Porto Rico.

The bill alleges that the defendants under the provisions of the act required the plaintiff to file certain statements under oath showing the

*Decision rendered, June 3, 1919. 260 Fed. Rep. 40.

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number of its workmen and the amount of wages paid them during the fiscal year ending June 30, 1918; that the plaintiff, in order to avoid criminal proceedings, filed said statements, but protested that it did not accept the benefits of the act, and was therefore neither required to file such statements nor to contribute to the fund referred to in section 28 of said act; that the defendants fixed the plaintiff's annual quota under the act at the sum of $7,639.68; that the defendant Benedicto, as treasurer of Porto Rico, claiming to act under the authority of said act, notified the plaintiff to pay one-half of said sum, otherwise attachment proceedings would be instituted against the plaintiff and its property for the collection of said sum, with interest at 1 per cent. monthly and costs.

That section 28 of the act provides as follows:

"That all employers accepting the benefits of this act and employing laborers under the conditions specified in this act shall contribute to the Workmen's Relief Trust Fund in the form and manner provided herein."

That in consequence of plaintiff's election not to accept the benefits of said act the plaintiff was not liable for said payment, and ought not to be required by the defendants to file any of the statements, reports, or other documents referred to in said act; that the acts of the defendants in requiring the plaintiff file such statements and reports and to make such payments were unwarranted and illegal, and caused irreparable damage to the plaintiff, for which it had no adequate and complete remedy at law. The prayer is that the defendants be enjoined generally from enforcing the act as against the plaintiff. The bill is supported by affidavits. The defendants appeared specially and moved to dismiss, on the ground that the suit was in reality against the people of Porto Rico, and that the people of Porto Rico had not consented to be sued; that the court was therefore without jurisdiction. This motion was denied. The parties agreed in open court that, if the court should rule against the motion to dismiss, the case should be considered as submitted on the merits, the facts to be taken as set forth in the bill. On September 19, 1918, the court sustained the plaintiff's contentions, and on September 24, 1918, a final decree was entered, permanently enjoining the defendants from enforcing the act in any particular as against this plaintiff.

The appellants' 15 assignments of error and their arguments raise not only the question of jurisdiction set up in the motion denied, but attack broadly the court's decision, claiming, inter alia, that the plaintiffs have a full, adequate, and complete remedy at law, and also that the Workmen's Compensation Act is not elective, but compulsory.

No question arises under the Constitution or laws of the United States, or under the Organic Act of Porto Rico. The equity jurisdiction asserted is based on diverse citizenship, and upon the claim that acts and threatened acts of interference with the plaintiff's property will do it irreparable damage. The District Court as a court of equity simply enjoined the defendants as officials of Porto Rico from acting pursuant to what the District Court held was an erroneous construction of the Porto Rico statute.

The gist of the District Court's decision was that the Porto Rican Legislature had enacted an elective and not a compulsory, Workmen's Compensation Act, so far as employers are concerned, and that therefore the Porto Rican officials should be enjoined from enforcing the act as against a rejecting employer.

In considering the problems thus presented, it is desirable to have in mind the legislative and constitutional status of compulsory Workmen's Compensation Acts when this act was passed. It is a matter of general knowledge that for many years courts, lawyers, and legislators were divided in their opinion as to the constitutionality of compulsory Workmen's Compensation Acts. See Ives v. So. Buffalo Railroad Co.,

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201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; Jensen v. So. Pacific Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276; and cases and authorities therein cited; State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.), 466; State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10.

This question finally reached the Supreme Court of the United States in the two cases of New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D. 1, Ann. Cas. 1917D, 629; and Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, where they were originally argued on February 29 and March 1 and 2, 1916. They were reargued January 30 and February 1, 1917, and decided on March 6, 1917. The decision was in favor of the constitutionality of compulsory Workmen's Compensation Acts.

Turning now to analogous legislation in Porto Rico: We find that by the act of April 13, 1916 (Laws of Porto Rico 1916, Act No. 19, p. 51), "An act providing for the relief of such workmen as may be injured, or of the dependent families of those who may lose their lives while engaged in trades or occupations, and for other purposes," the Porto Rican Legislature had provided for an elective compensation act. Section 23 is as follows:

"Sec. 23.—*Election by Employer.* This act, except the section relating to defenses (section 25), shall apply to all employers or, as provided in section 4 of this act, unless prior to the injury they shall have rejected the benefits of this act in the manner hereinafter provided.

"The rejection by the employer of the benefits of this act shall be signified by filing with the Workmen's Relief Commission a written statement expressing such election. The said statement must be filed by the employer on or before the fifteenth day of June, 1916, and on or before the thirtieth day of April of each succeeding year.

"It shall be the duty of the Workmen's Relief Commission to keep official records showing all refusals made by employers."

Section 24 is headed "election by Employees," and provides an elaborate plan for signifying such election and the results thereof. Section 25 deals with "defenses abolished in case employer rejects the benefits of this act," and cuts off from such employer the defenses of contributory negligence, fellow servant, assumption of risk, and negligence of an uninsured independent contractor or subcontractor.

This act was amended in 1917 (Laws of Porto Rico, 1917, No. 9, approved April 12, 1917), by an act entitled "An act to amend an act entitled 'An act providing for the relief of such workmen as may be injured, or the dependent families of those who may lose their lives, while engaged in trades or occupations and for other purposes,' approved April 13, 1916."

This act simply amends sections 3, 4, 10, 13, 14, and 23 of the act of 1916. The amended section 23 is entitled "Election by Employer" and contains explicit provisions for such election to be made in writing. Section 24 of the act of 1916, providing for "Election by Employees," is left unchanged.

Under section 1 of the act of 1916, which is left unchanged by the amendment of 1917, a trust fund is created, starting with an appropriation of $25,000 from the treasury of Porto Rico, and thereafter based upon insurance premiums levied upon employers who do not elect to reject the benefits of the act by filing with the Workmen's Relief Commission a written statement expressing such election.

But the next Porto Rican Legislature that convened after the Supreme Court of the United States had in the above-cited cases held compulsory Compensation Acts constitutional, passed the act in question of February

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25, 1918. This is a new act. By section 32 all laws and parts of laws in conflict therewith are repealed. It does not purport to be an amendment of the old acts. Its title is as follows:

"An act to promote the welfare of the inhabitants of Porto Rico in regard to accidents causing death or injuries to workmen while engaged in their work: establishing the duty of employers to compensate their employees or heirs as defined in this act, for injuries or death irrespective of negligence, and to provide ways and means for the enforcement of this duty; creating an insurance fund to secure employers against such liability and providing for the management and regulation of such insurance; creating a Workmen's Relief Commission and determining its powers and duties; establishing the liability of the people of Porto Rico with regard to their laborers for injuries or death of such laborers in works performed by administration and for other purposes."

In this title the words "the duty of employers to compensate their employees," etc., are not without significance. Section 2 of this act provides that it shall apply to laborers injured, disabled, or killed by accident occurring while engaged in their work. "This act shall not apply to any employer who regularly employs less than three laborers." Exclusio unius, inclusio alterius. This section is obviously of general application to all employees except the few excluded classes. This section also authorizes the Workmen's Relief Commission to pay compensation pursuant to the terms of the act, "drawing from the trust fund belonging to the government" the necessary sums. "The sums so paid need not be reimbursed to the people of Porto Rico out of the fund created by this act." This reference to the fund "belonging to the government," and provision that compensation shall be paid without providing for reimbursement, clearly puts the credit of Porto Rico back of the employees' right to compensation. The Porto Rican government has thus assumed the financial burden of paying compensation to the victims of all ordinary industrial accidents.

Section 7 requires "every employer subject to the provisions of this act * * * to report to the Workmen's Relief Commission as soon as possible within a period of five days from the date of the accident, all injuries suffered by his employees in the course of their employment." The words "subject to the provisions of this act" are given full effect, if applied only to employers employing not less than three laborers. There is nothing in these words indicating an election open generally to all employers. Refusal or neglect of an employer to make such report is punishable by a fine of from $25 to $50.

Section 10 provides for the grouping of occupations, and for levying insurance rates on the estimated pay roll of the employer, considering also the risk of injury. This section is also of general application, and contains no language consistent with the theory that the employer has any option to obey or not to obey its provisions.

Section 11 authorizes the treasurer of Porto Rico to assess and collect "from every employer of workmen subject to this act such annual premiums as the Workmen's Relief Commission shall determine in accordance with the preceding section," etc. Here again the words "subject to this act" are given full operation if referred back to the exception in section 2 of employers employing less than three laborers.

From the foregoing it will be observed that sections 7, 10, and 11 require all employers except those employing less than three laborers to furnish to the Workmen's Compensation Commission accident reports and data upon which the commission charged with the responsibility of administering the act may not only investigate accidents, and classify industries, but levy and collect from any employer "subject to this act such annual premiums" as it shall determine to be practicable and just. These insurance premiums are levied, not merely for the purpose of reim-

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bursing the government, which under section 2 is made primarily responsible for the payment of the compensation, but also for the purpose of prorating the cost of industrial accidents equitably among various industries, and incidentally, under the latter part of section 10, penalizing, by high insurance rates, poor or careless management which increases the risk of industrial accidents.

Sections 20 to 22 require careful consideration. They are as follows:

"Defenses Abolished.

"Section 20.—If any accident occurs to any workman employed by an employer subject to the provisions of this act, who has failed to comply with said provisions relative to the submission of reports and the payment of premiums, the Workmen's Relief Commission is hereby authorized to charge said employer with the amount of such compensation as the commission may authorize to be paid to the injured workman and the treasurer of Porto Rico shall levy and collect said amount in the same manner prescribed for the collection of premiums. When a laborer or his heirs, in accordance with this act, and in the case specified in section 20,[1] and the Workmen's Relief Commission in the cases specified in section 21,[2] institute an action to recover damages from an employer, it shall not be a defense in the favor of the employer—

"(a) That the employee was guilty of contributory negligence;

"(b) That the injury was caused by the negligence of a fellow employee;

"(c) That the employee had assumed the risk of injury;

"(d) That the injury was caused by the negligence of a subcontractor or of an independent contractor, unless the contractor or independent subcontractor shall have been insured in accordance with the provisions of this act.

"No contract between employer and employee purporting to permit any of said defenses shall be valid."

The footnotes state that "section 20" reads in the Spanish text 21. and that "section 21" reads in the Spanish text 22. We treat section 20 as so reading; otherwise it is senseless. Sections 21 and 22 are as follows:

"Injuries by Willful Act or Gross Negligence of Employer.

"Sec. 21.—Nothing in this act contained shall be interpreted as depriving the injured workman, or his heirs, in accordance with this act in case of death, of waiving the provisions of this act at any time prior to receiving compensation under this act and to claim and recover damages from his employer, in accordance with the provisions of the law before this act takes effect, when the injuries sustained by the said workman were caused by the illegal act or gross negligence of his employer; provided, that only in case of waiver shall the workmen comprised in this act, or their heirs in accordance with the same, have the right to institute an action for damages against the employer.

"Liability of Third Persons.

"Sec. 22.—When the injury for which workmen are entitled to compensation under this act shall have been sustained under circumstances creating a liability against some other person or against the employer where the injury was caused by his illegal act or gross negligence or by defects in the machinery or implements and when the workman or his heirs receive compensation under this act, the Workmen's Relief Commission shall be subrogated to the rights of the injured workman or his heirs and may prosecute an action and recover damages from such third person or such employer liable for such injury, which damages when recovered shall be covered into the Workmen's Relief Trust Fund for the

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benefit of the particular group in which the injured workman's occupation was classified."

The effect of these three sections will be most conveniently considered by taking them in reverse order:

Section 22 (called section 21 in section 20) obviously has no bearing upon the present question of rights of action, in the ordinary case of industrial accident, remaining open to the employee. It refers merely to the right of the Workmen's Relief Commission against third persons and to be subrogated to the rights of the injured workman, in cases of gross negligence or of illegal act, when the victim of the accident has exercised his right of election to take compensation.

The proviso at the end of section 21 is significant. It reads:

"Provided, that only in case of waiver shall the workman (sic) comprised in the act, or their heirs in accordance with the same, have the right to institute an action for damages against the employer."

Manifestly this proviso is here inserted in order to make it entirely clear that the right of waiver referred to in the earlier part of section 21 is to be strictly limited to cases of illegal act or gross negligence, and that, except in such cases, all rights of action under the old law are intended to be taken away from the victims of industrial accidents.

The first part of section 21 gives to the victim of an accident caused by the illegal act or gross negligence of his employer an option either to receive compensation under the act or to recover damages. If the victim elects to recover damages, then under section 20 the employer is cut off from the defenses of contributory negligence, fellow servant, etc.

The right of waiver referred to in section 20 is thus strictly limited to cases of accidents caused by illegal act or gross negligence. In the ordinary case of industrial accident the victim has no option whatsoever. He must find his remedy under the act or he is remediless, for the proviso at the end of section 21 makes it clear that all his old rights of action are cut off.

It is thus apparent that the act of 1918 is, as to all employees, excepting only the classes specifically excluded under section 2 and the victims of accidents caused by illegal acts or gross negligence given an option under section 21. compulsory. All rights of action against employers existing under the old law are, as to the great mass of victims of industrial accidents, taken away. Whatever the right of employers to elect, employees are limited to such remedies as the new act affords for compensation under the plan provided; and this compensation is to be paid from the treasury of Porto Rico. The great mass of victims of ordinary industrial accidents in Porto Rico are thus cut off by this act from their former rights against their emloyers, and are given in lieu thereof a right to claim compensation from the public treasury.

The first sentence of section 20 also shows that no failure of employers to pay their quota was intended to affect the right of employees under the new act. It provides:

"If any accident occurs to any workman employed by an employer subject to the provisions of this act, who has failed to comply with said provisions relative to the submission of reports and the payment of premiums, the Workmen's Relief Commission is hereby authorized to charge said employer with the amount of such compensation as the commission may authorize to be paid to the injured workman and the treasurer of Porto Rico shall levy and collect said amount in the same manner prescribed for the collection of premiums."

This means that failure of an employer to comply with any of the earlier parts of the act is not to be allowed to affect the right of his employee to compensation and payment thereof from the treasury of

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Porto Rico. The recalcitrant employer who has failed to pay the premiums provided in section 11 is, under the quoted provision, to be held to respond for the specific amount of compensation awarded his injured employee. The words "who has failed to comply with said provision" do not import the exercise of a right; they import nonperformance of a duty. Nothing in this section implies that such employer is by such failure to be exempt from the penal provisions, both civil and criminal, attached by section 11 to such noncompliance. This provision is entirely inconsistent with the theory of the court below that the employer has a right of election; it simply provides for the rights of his injured employee pending the employer's being compelled to do his duty.

We have, then, a plan for dealing with the great mass of industrial accidents which makes the treasury of Porto Rico primarily responsible for payment of compensation to the injured employees. The employees and their dependents, except the comparatively few in the excluded classes, are cut off from all their former rights against their employers, and must look to the treasury of Porto Rico as their only source of relief in case of accident causing injury or death. The treasury must pay, whether it succeeds or not in obtaining reimbursement from the employers whose former liabilities have thus been thrown upon the government. The employees have no option, even if their employers have. The treasury has no option.

There is no discussion in the opinion of the District Court as to the plight of the Porto Rican treasury resulting from that court's enjoining the Workmen's Relief Commission from assessing premiums as contemplated by the act. Nor was any consideration apparently given to the fact that the act holds forth no election to employees.

Compare Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 37 Sup. Ct. 260, 263, 61 L. Ed. 685, Ann. Cas. 1917D, 642, where Mr. Justice Pitney said.

"While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544 [34 Sup. Ct. 359, 58 L. Ed. 713]; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576 [35 Sup. Ct. 167, 59 L. Ed. 364]), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers."

The whole difficulty arises out of section 28, which is as follows:

"That all employers accepting the benefits of this act and employing laborers under the conditions specified in this act shall contribute to the 'workmen's relief trust fund' in the form and manner provided herein."

Upon these words, "accepting the benefits of this act," the District Court's decision entirely turns. Upon these words alone the court grounded its opinion that the act was, as to employers, elective throughout; that, without acceptance, the employer owed no duty arising under this act.

[1] While it is manifestly undesirable that a Porto Rican statute should receive its first judicial construction in the federal court, we may not, on that ground alone, refuse the plaintiff relief, if otherwise clearly entitled thereto. Compare Kuhn v. Fairmont, 215 U. S. 349, 357, 358, 30 Sup. Ct. 140, 54 L. Ed. 228; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Mich. C. R. R. v. Powers, 201 U. S. 245, 291 226 Sup. Ct. 459, 50 L. Ed. 744; Coulter v. L. & N. R. R. R., 196 U. S. 599, 609, 25 Sup. Ct. 342, 49 L. Ed. 615; Pelton v. Bank, 101 U. S. 143, 25 L. Ed. 901.

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[2] The appellant strenuously urges that the action is in effect against the people of Porto Rico, and that the court is therefore without jurisdiction; Porto Ri having rights of sovereignty similar to those accruing to the states under the Eleventh Amendment of the Constitution. Porto Rico v. Rosaly, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507.

Assuming that for present purposes Porto Rico is to be treated as though a state of the Union, the question thus presented is a close and difficult one. The situation is in many respects like that presented in the case of Lankford v. Platte Iron Works, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316, in which five of the justices of the Supreme Court were of the opinion that an action by a depositor in an insolvent bank to enforce the provisions of the Oklahoma Depositors' Guaranty Fund Act as a suit against the state, and therefore could not be maintained. Four of the justices were of the opposite opinion. In that case the suit was against the state officials to compel them to perform an alleged duty, the result of which would have been to take money out of the fund, title to which was vested in the state. In the present case, the suit is against Porto Rican officials to prevent them from enforcing payments from the plaintiff into the treasury of Porto Rico. In both cases the financial status of the treasury of the state (treating Porto Rico for the moment as a state) is involved.

But if threatened acts of the Porto Rican Workmen's Rielief Commission are without warrant in law, and, if not prevented, they will work irreparable injury to the plaintiff, we think the case falls within the principle of Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, and that the appellants' contention that the suit is really against the people of Porto Rico cannot be sustained. See, also Greene v. Louisville, etc., R. R., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Philadelphia Co. v. Stimson, 223 U. S. 605, 621, 32 Sup. Ct. 340, 56 L. Ed. 570; Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 293, 33 Sup. Ct. 312, 57 L. Ed. 510; Truax v. Raich, 239 U. S. 33, 37, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Hopkins v. Clemson Agricultural College, 221 U. S. 636, 642-644, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243.

[3, 4] The defendants also insist that, assuming the act should be construed as the plaintiff construes it, the plaintiff has a full, adequate, and complete remedy at law; otherwise stated, that the acts of the defendants, even if unwarranted, do not work irreparable damage to the plaintiff.

Plainly, it will do the plaintiff no irreparable damage to comply with all the provisions of the act except the payment of premiums. To make report of its accidents as provided in section 7, to furnish the data required for the grouping of occupation under section 10, made expressly a duty by the provisions of section 13, cannot conceivably work any substantial, much less irreparable, damage to the plaintiff. Without more discussion of this point, it is plain that no injunction should stand against the enforcement, as against the plaintiff, of all the provisions of the act other than those directed to the collection of the insurance premium.

Does the fact that, under section 11, the defendants have taken proceedings to assess and collect, from the plaintiff, a semiannual insurance premium of $3,819.84, work irreparable damage to the plaintiff, assuming this threatened assessment and attachment to be illegal? Such premiums are to be collected "in accordance with the law and procedure which is at present or which may hereafter be in force for the collection of unpaid property taxes." If not strictly a tax, these insurance premiums are, both in their relation to the Porto Rican treasury as well as in their manner of assessment and collection, closely analogous to taxes.

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Certainly it would be difficult to hold that these insurance premiums are not "revenue due the government of Porto Rico." Now, by the Porto Rican act of March 9, 1911, entitled "An act to provide for the payment of taxes under protest," there is a plain and explicit remedy provided for the recovery of taxes and revenue illegally collected. That statute is as follows:

"Section 1. That in all cases in which an officer charged by law with the collection of revenue due the government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

"Sec. 2. Be it further enacted that, upon his making such payment, the officer or collector shall pay such revenue into the treasury of Porto Rico, giving notice at the time of the payment to the treasurer that the same was paid under protest.

"Sec. 3. Be it further enacted that, the party paying said revenue protest may, at any time within thirty days after making said payment, and not longer thereafter, sue the said treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected as not being due from said party to the government, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the treasurer shall repay the same, which payment shall be made in preference to other claims on the treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

"Sec. 4. Be it further enacted that, there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally.

"Sec. 5. Be it further enacted that, no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue, either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other."

We think this statute affords the plaintiff full and adequate relief for any unlawful assessment under the new Workmen's Compensation Act.

It requires no discussion or citation of authorities to show that only a very plain case would warrant a court of equity in issuing an injunction tending to cripple a government in the collection of taxes necessary for its existence and performance of its essential public duties.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 684, 23 Sup. Ct. 452, 453 (47 L. Ed. 651), the court by Mr. Justice Peckham, said:

"It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injuncton against proceedings under the law; but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc. See Cruickshank v. Bidwell, 176 U. S. 73, 80 [20 Sup. Ct. 280, 44 L. Ed. 377], where many of the authorities on this subject are collected in the opinion which was delivered by Mr. Chief Justice Fuller. See, also, Pittsburgh, etc., Railway v. where Mr. Justice Gray dealt with the subject quite fully. We must judge the case at bar under the rules laid down by the authorities cited." Board of Public Works, 172 U. S. 32 [19 Sup. Ct. 90, 43 L. Ed. 354].

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In Pittsburgh, etc., Railway v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, Mr. Justice Gray states the rule as follows:

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

Moreover, in considering the alleged irreparable damage to be done the plaintiff by enforcing payment by it of its insurance premium, it should not be overlooked that the plaintiff gets full consideration for this payment; the government has already assumed the plaintiff's financial responsibility for industrial accidents. The right of election that the plaintiff really insists upon is not a right to retain responsibility under the old law for accidents suffered by its employees. There is no contention by the plaintiff's counsel, or suggestion in the opinion of the District Court, that the plaintiff, by exercising its alleged right of election, remains liable under the old law to its employees. Apparently it is recognized that financial responsibility for industrial accidents has now been assumed by the treasury of Porto Rico. The plaintiff really therefore, seeks to escape, entirely, liability for industrial accidents. It would unload its entire burden, both under the new and under the old law, upon the treasury of Porto Rico, which of course means upon the general taxpayers or upon other employers who hold different therories of civic duty.

We hold that the court below had no jurisdiction to entertain this suit and to enjoin the enforcement by the defendants as against the plaintiff of the Workmen's Compensation Law.

What we have said above goes upon the assumption that the plaintiff and the District Court were correct in construing section 28 as holding forth an election to the employers to accept or reject the insurance provisions of the act. But if we are in error in holding that even on that assumption plaintiff is not entitled to relief in a court of equity — if it is the duty of the federal court, without previous construction of this act by the local Porto Rican courts, to put its own construction thereon—then we are constrained to reject the interpretation put thereon by the plaintiff and adopted by the District Court.

[5-8] We think that the act construed as a whole, as every act must be, shows that the Legislature intended it to be compulsory upon employers as well as upon employees. It is elementary that, if there are inconsistencies in various provisions of an act, the court must do its best to reconcile them, determining from the act, as a whole, construed under the circumstances surrounding the Legislature at the time of its enactment, the legislative intent. Where the language of a statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory results, the court must ascertain the true meaning, referring to the purpose—the spirit—of the law, not adhering slavishly to the letter thereof. See 36 Cyc. 1106, 1108, and cases cited.

Mr. Justice Field in United States v. Kirby, 7 Wall. 482, 486 (19 L. Ed. 278) states the principle as follows:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character."

Words apparently inserted through inadvertence, which, if literally construed, would destroy the obvious purpose of the Legislature, work

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injustice, or create contradictions with other provisions of the act which they regulate, are to be rejected, as controlled by the general purpose and by other provisions otherwise impossible of fair interpretation and application. Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; United States v. Babbit, 1 Black, 55, 61 17 L. Ed. 94; Zouch v. Stowell, Plowd. 366; United States v. Freeman, 3 How. 565, 11 L. Ed. 724; Stewart v. Kahn, 11 Wall. 493, 504, 20 L. Ed. 176; Hawaii v. Mankichi, 190 U. S. 197, 212, 23 Sup. Ct. 787, 47 L. Ed. 1016; Smythe v. Fiske, 23 Wall. 374, 280, 23 L. Ed. 47; 36 Cyc. 1109, and cases cited; Sweetser v. Emerson, 236 Fed. 161, 149 C. C. A. 351, Ann. Cas. 1917B, 244.

Another elementary rule is that remedial statutes are to be liberally construed in order to give effect to the humane purposes of the Legislature.

Applying these well-settled principles to the act in question, we are forced to the conclusion that the words in section 28 "accepting the benefits of this act" furnish no adequate basis for the unjust and contradictory results accruing under the construction contended for by the plaintiff and adopted by the District Court. We find it impossible to believe that the Legislature of Porto Rico intended to give employers an option to accept or reject the provisions of the new compensation act without at the same time affording analogous opportunity to employees. Equally impossible is it to believe that the Legislature intended to impose upon the public treasury liability for compensation paid to the victims of industrial accidents without at the same time providing that the industries in which such accidents occur shall by some uniform and just system reimburse the public treasury for the bulk, if not for all, of the compensation so paid. It would be a strange public policy which would permit this plaintiff or any other employer to elect himself out of all liability for the industrial accidents of his employees, throwing the entire burden of compensation therefor upon the public treasury.

As indicated above, plaintiff's contention, sustained by the District Court, is not that it may elect as between the old law and the new law, or as between the state insurance scheme and paying compensation in accordance with the terms of the act to such of its own employees as suffer industrial accidents; the decree of the District Court provides that the defendant shall be enjoined from "in any manner enforcing any of its orders against the said complainant." As the act cuts employees off from all rights except those accruing under the act, and as the decree of the court below enjoins the defendants from enforcing the act in any particular against the plaintiff, the result, beyond question, is to leave the plaintiff free from all money liability for accidents suffered by its employees.

The facts that this new act was passed at the next session of the Legislature after the Supreme Court of the United States had sustained the constitutionality of compulsory acts; that the title of the act indicates a duty imposed generally upon employers; that the old act, which contained in repeated and explicit form provisions for the exercise of election both by employers and employees, was expressly repealed; that the new act follows in general plan the old act, except in the elimination of these express provisions for election; that the new act is plainly compulsory as to all employees (except the clearly excluded classes); that the public treasury is held responsible for paying compensation provided in the act, and that no adequate resources are provided therefor, except on the theory that the act is compulsory as to employers; that every part of the act except the short isolated phrase in section 28, imports a mandatory duty resting upon employers—these and many order considerations show that the Legislature intended to adopt a consistent, compulsory theory of workmen's compensation, substantially in accordance with the

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plan adopted in New York and Washington, and sustained by the Supreme Court in New York Central v. White, supra, and mountain Timber Co. v. Washington, supra.

In the construction we adopt of this act there is far less difficulty than that with which the Supreme Court dealt in Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. The problem in that case was whether the contract labor law applied to the employment of a foreign rector by Trinity Church. The Circuit Court held that it did. 36 Fed. 303. That act provides:

"* * * That it shall be unlawful for any * * * corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien * * * into the United States * * * under contract or agreement, parol or special, express or implied, * * * to perform labor of service of any kind in the United States. * * *"

In the case of this statute, Trinity Church contracted with Mr. Warren, an alien residing in England, to remove to New York and become its rector and pastor. Yet the Supreme Court held that the act, properly construed, did not apply to this contract.

Mr. Justice Brewer used the following language:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: 'From which cases, it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances,'"

Reference may be had to the rest of this opinion for an illuminating discussion of other cases decided by other courts in whch far greater difficulties of sound and consistent construction were met than those presented by the Porto Rican Workmen's Compensation Act.

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Compare also Knowlton v. Moore, 178 U. S. 41, 77, 20 Sup. Ct. 747, 761 (44 L. Ed. 969), where the court said:

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

If we were to construe section 28, standing alone and without reference to its relation to the other clear and explicit provisions in the act, and to the manifest general purpose of the Legislature, we should find difficulty in saying that the Legislature intended to authorize an employer to reject the act. Section 28 provides no method by which an acceptance or a rejection shall be signified to the Workmen's Relief Commission. Assuming for the moment a right of election was intended, it would be very strange for a Legislature to provide no machinery for indicating such election. This absence is in striking contrast with the clear and explicit provision in section 23 of the act of 1916, entitled "Election by Employer," and containing the following language.

"The rejection by the employer of the benefits of this act shall be signified by filing with the Workmen's Relief Commission a written statement expressing such election. The said statement must be filed by the employer on or before the fifteenth day of June, 1916, and on or before the thrtieth day of April of each succeeding year."

At most section 28 grounds but an ambiguous and doubtful implication of a right to elect.

If we were to construe section 28, as did the District Court, as granting to every employer the right to reject, what should we do with the plain and explicit provisions of sections 10 and 11, which contain a plain mandate for levying insurance premiums upon all employers, except the clearly excluded classes?

If we adopt this method of avoiding the alleged difficulty in construing section 28, we create a greater difficulty in construing sections 10 and 11.

Do the words "accepting the benefits of this act" mean anything more than "receiving the benefits" or "entitled to the benefits"? Certainly they do not clearly mean that "only employers who (by some undefined act done at some unnamed time) accept the benefits of this act shall be required to contribute to the trust fund."

Without further elaboration, we regard it as entirely clear that this court is not warranted in so construing this participial clause as to render nugatory other clear and explicit provisions of the act as well as to thwart the obvious dominating legislative purpose.

If there were only reasonable doubt as to whether the Legislature intended this act to be elective or compulsory, a federal court ought not to enjoin its enforcement, particularly when such injunction would or might cripple the public treasury. But, construing the act as a whole and in accordance with the well-settled rules and principles laid down in the cases cited supra, we are unable to believe that there is even reasonable doubt that the Porto Rican Legislature intended to impose, upon employers and employees alike, the compensation theory in substitution for the negligence theory.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with costs; and the appellants recover their costs of appeal.

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SUPREME COURT OF CALIFORNIA.

JUDSON MFG. CO. ET AL.

vs.

INDUSTRIAL ACCIDENT COOMMISSION ET AL. (S. F. 9039.)*

1. MASTER AND SERVANT—WORKMEN PERFORMING "SERVICE" ON ARRIVAL AT PLACE OF WORK.

An employee, who has arrived at his employer's premises and is thereon for purpose of immediately commencing his actual work, is performing "service" incidental to his employment, within Workmen's Compensation Act, relative to right of compensation for his injury then occurring.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Service.)

2. MASTER AND SERVANT—INJURY TO WORKMEN CROSSING TRACKS IN PLANT "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Accident to employee on his way to work, by being struck by another's train, in use of a necessary mode of ingress, across railroad tracks, provided and required by the employer, and as between employer and employees constituting part of the employer's plant, arose out of and occurred in the course of his employment, within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Shaw and Melvin, JJ., dissenting.

In Bank.

Prosperina Gallia was awarded compensation by the Industrial Accident Board for death of Felice Gallia, and the Judson Manufacturing Company, employer, and the California Casualty Indemnity Exchange, insurer, apply for certiorari. Award affirmed.

Rehearing denied; Shaw and Melvin, JJ., dissenting. Angellotti, C. J., votes for rehearing.

Redman & Alexander, of San Francisco, for petitioners.

Michele Cimbalo, of San Francisco, for respondent Gallia.

Christopher M. Bradley, of San Francisco (A. E. Graupner and Warren H. Pillsbury, both of San Francisco, of counsel), for other respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in awarding compensation for the death of one Felice Gallia, who, on April 1, 1918, was struck and killed by an engine operated by the Southern Pacific Company while he was pursuing his way to work along a path crossing the latter's tracks.

*Decision rendered, Sept. 26, 1919. Rehearing Denied Oct. 23, 1919. 184 Pac. Rep. 1.

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Gallia was a laborer in the employ of the Judson Manufacturing Company; his duties consisting in attending an open-hearth furnace. The furnace and factory of the company are situated on the east shore of San Francisco Bay. The premises are bounded on the west by the bay shore and on the east by the right of way on which the Southern Pacific Company maintains numerous tracks for its through and local trains. A path crossing this right of way, and leading from the end of a public street at its eastern extremity directly to the gate of the factory yard at it western extremity, was the sole means of ingress and egress for the employees of the Judson Manufacturing Company to and from its factory and furnace. It was, moreover, the means of access required and authorized by the company. The path was not a public highway. The crossing was, in fact, dominant as to user in the employer, servient to its purposes, and intimately associated with its plant as a part of its necessary establishment. The company had, indeed, even claimed a lawful easement over the crossing for the purposes of the plant. At the time of his injury and death, which occurred about five minutes before the beginning of his shift, Gallia was proceeding from his residence to the factory, and had reached a point on the path in question about 20 feet east of the factory gate.

The Industrial Accident Commission found that Gallia's death resulted from an injury arising out of his employment and received while he was performing a service growing out of incidental to, and in the course of that employment. Petitioner insists that the facts do not support the finding.

[1, 2] The right to compensation is by no means restricted to those cases where the injury occurs while the employee is actually presently manipulating the tools of his calling. It would be unnecessary to the decision of this case to attempt to formulate a precise and comprehensive definition of the term "service," as used in the statute now under consideration. It seems to us, however, that when an employee has arrived at the premises of his employer, and is thereon for the purpose of immediately commencing his actual work, he is performing service incidental to his employment. The facts stated above show that as between the employer and his employees the path across the Southern Pacific Company's right of way was in fact a part of the employer's plant, and that at the time of his death Gallia was there solely in the line of his duty as an employee. It would be a harsh and indefensible rule that would withhold compensation from an employee engaged in traversing a dangerous pathway in his employer's building on his way to his own particular place of work therein, on the ground that he had not yet entered upon the real work of his employment. We can perceive no difference in principle between such a case and the case at bar.

There have been a great number of cases in other jurisdictions in which the question here involved has been discussed—namely, as to the point, at which a person who has been injured while away from his actual place of work leaves his employment. The line is a very fine one. Mole v. Wadworth, 6 B. W. C. C. 129; Richards v. Morris, [1915] 1 K. B. 221; Gane v. Norton Hill Co., 2 B. W. C. C. 41; Moore v. Manchester Liners, 3 B W. C. C. 527; In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318—in which compensation was awarded. De Constantin v. Pub. Serv. Com., 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329; Nelson R. Constr. Co. v. Ind. Com. of Ill., 286 Ill. 632, 122 N. E. 113; Ocean Accident, etc., Co. v. Ind. Acc. Comn., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336—in which compensation was denied.

In the case last cited we find a statement to the effect that all those accidental injuries which occur while the employee is going to or returning from his work are excluded from the benefits of the act. This sweeping dictum was not necessary to the decision of the case. The accident

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there considered occurred, it is true, while the deceased was attempting to reach his place of employment; but the mode of ingress which he undertook to use was not one provided and required by his employer, it was in no sense a part of the premises where his work was to be performed, and, finally, it was not in fact a mode of ingress to his work at all. As remarked by Lord Loreburn in Walters v. Staveley Co., 4 B. W. C. C. 305:

"In applying this act one has to look to the words of the act itself. * * * Other cases are only useful as illustrations of the way in which these words are applied, and nothing, I think, is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts."

This very danger is illustrated by the citation of that case in support of the dictum in the Ocean Accident, etc., Co. Case. It appears from a careful reading of the opinions of their lordships that their decision in the Walters Case was rested solely upon the ground that the contract of employment there involved did not contemplate the uses of the pathway where the injury occurred as a necessary incident to gaining access to the place of employment. The facts, in other words, failed to show that as between the company and its employees the path was in fact a part of the company's plant. Gilmour v. Dorman Co., 4 B. W. C. C. 279, also cited in the Ocean Accident, etc., Co. Case, is similarly distinguishable from the case at bar. On the other hand, it appears from Moore v. Manchester Liners, supra, and from other cases cited by the court in the Ocean Accident, etc., Co. Case, as well as from the additional cases which we have cited, supra, that an injury due to the necessary means of access to the employer's premises, required by the employer and contemplated in the employment, is compensable.

We are of the opinion that the facts here disclosed warranted the finding that the accident by which Gallia met his death arose out of and occurred in the course of his employment. It follows that the appellant is entitled to compensation.

The award is affirmed.

We concur: Angellotti, C. J.; Wilbur, J.; Lawlor, J.; Olney, J.

SHAW, J. I dissent. The Constitution authorizes the Legislature to create a liability for compensation to be made to an employee, by the community at large through the medium of the employer, for an injury to such employee incurred in the course of his employment. Const. art. 20, § 21, as adopted in 1911; Western I Co. v. Pillsbury, 170 Cal. 694, 707, 151 Pac. 398. To this the Legislature has added the condition that the injury must be one that was sustained by accident arising out of the employment. Workmen's Compensation Law 1913 (St. 1913, p. 283), § 12(a); Act 1917 (St. 1917, p. 834) § 6(a). Gallia was employed to work in the factory of the plaintiff. The only entrance to the factory was a gate on the easterly side. From this gate a pathway extended easterly across the adjacent tracks of the Southern Pacific Railroad Company into the end of a public street. This path was commonly used for access to the factory by all persons desiring to enter, and there was no other way or means of access. In going from his home to the factory Gallia was crossing the tracks aforesaid upon this path, and while so doing he was struck by a Southern Pacific engine and killed.

His contract of employment did not provide that he was to be considered in service while going to the factory from his home, nor did it require him to perform any service while crossing said tracks along said path. It did not specify the route he was to travel in going to and from the factory. At the time he was struck he was not engaged in any work or service for the plaintiff; he had not yet reached the place of employment or the factory, but was still on his way there-

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to. The engine belonged to the Southern Pacific Company, and was in no way connected with the business of the plaintiff or the work Gallia was to do.

The accident had no more to do with his employment than would an accident which occurred any place on the public street by which he reached the path. His act in going there may have been a thing done "in the course of his employment," according to a few rather strained constructions of that phrase in some of the decisions; but that meaning is against the weight of authority. Bradbury's Workmen's Compensation Law (3d Ed.) p. 468. But I know of no case which holds that an injury from an accident so occurring is one "arising out of" the employment. It could be said to do so only upon the theory that the employment created the necessity of going to the place of employment and that this necessity was the cause or occasion of his being in the place of danger. But exactly the same thing could be said if he had been injured anywhere in the street along his usual and proper route from his home to the factory. And so it might be said that almost anything that occurs to the employee while absent from the place of work arises directly or in natural sequence out of his having been, or being required to be, at the place of employment. But the authorities are unanimous that the phrase does not have this comprehensive meaning. I can see no substantial distinction between this case and our decision in Ocean, etc., Co. v. Industrial Accident Commission, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, and the many similar cases cited therein, and in Bradbury's Workmen's Compensation Law, above cited, to the effect that the employer is not liable for an injury to the employee during his journey to or from his place of work.

I concur. Melvin, J.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 2.

ROYAL INDEMNITY CO.

v.

MIDLAND COUNTIES PUBLIC SERVICE CORPORATION.

(Civ. 2772.)*

6. ELECTRICITY—CONTRIBUTORY NEGLIGENCE.

One working in a barely field at the foot of a pole of an electric power company *held* not guilty of contributory negligence in attempting to back a horse off a guy wire to the pole which such horse had straddled, the action resulting in a breaking of the strands of the wire and a consequent shock to the person through the horse.

(For other cases, see Electricity, Dec. Dig. § 181[1].)

7. MASTER AND SERVANT—PLEADIDNG SUFFICIENT TO ENFORCE SUBROGATION OF INSURER TO RIGHTS OF INJURED EMPLOYEE.

Allegations that plaintiff by its policy of insurance insured one and his employees, and that policy was written under the terms of the

*Decision rendered, Aug. 12, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919. 183 Pac. Rep 960.

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Workmen's Compensation, Insurance and Safety Act, *held* to carry with it an implied allegation that plaintiff was an insurance carrier entitled to be subrogated to the rights of an injured employee against party causing injury.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

9. MASTER AND SERVANT—RIGHT TO SUBROGATION BY WORKMEN'S COMPENSATION INSURER SHOWN BY EVIDENCE.

Evidence of plaintiff insurance carrier under the Workmen's Compensation Act, *held* sufficient to show that a lawful claim had been made by an injured employee and paid by plaintiff, to entitle it to be subrogated to employee's rights against party causing injury.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Royal Indemnity Company, a corporation, against the Midland Counties Public Service Corporation, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.
Everts & Ewing and M. K. Wild, all of Fresno for respondent.

LANGDON, P. J. This is an appeal from a judgment rendered on a verdict of a jury in favor of the plaintiff in the sum of $13,000. The plaintiff claims to be subrogated to the rights of one A. J. Bellah to recover for personal injuries alleged to have been received by him by reason of the negligence of the defendant. The injured man was a farm hand and was in the employ of one Max Flentge at the time of the accident. It is claimed by the plaintiff that the employer and employee were within the provisions of the Workmen's Compensation Act, and that the plaintiff was the insurance carrier of the employer and paid the claim of the employee and in consequence succeeded to his rights against the defendant.

[1-4] The facts of the case, in so far as they involve the merits, are as follows: The defendant was a public service corporation engaged in the business of generating and transmitting electricity in the county of Fresno and elsewhere. It had a line of poles running along the county highway into the town of Coalinga, on which poles ran the high-power lines of the company. The pole involved here was situated on the land leased and cultivated by the employer and along the line of the county road about 8 or 10 feet inside the line. It was guyed by wires running from a point near the top of the pole to the ground on either side. Some of the wires on this pole were dead, but the lower wires, with which we are concerned here, were carrying a load of 10,000 volts of electricity. The guy wires were insulated at a point where, had they broken near the ground and fallen in a perpendicular line from the top of the pole, the insulation would have been below the lowest live wire and the electricity could not have traveled down their length to the injury of any one upon the ground. On the day of the accident, A. H. Bellah, the injured man, was working in company with another man, Wagner, in mowing around the edge of a field of barley. He had a team of horses, as also had his companion. Desiring to eat their luncheon at the place where they found themselves at the noon hour, they unhitched their horses and allowed them to graze, and retired themselves to the shade of the wagon to rest. One of Bellah's horses was a "snorting" colt and he hitched it to an older horse. The older horse in some way got astraddle of the guy wire of the defendant. Bellah attempted to back it off of the wire. There is conflicing testimony regarding the amount of strain put upon the wire by the horse during Bellah's attempt to release it.

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One witness testified that the horse was plunging and kicking, but Bellah testified that he was not plunging. But, at any rate, while Bellah was at tempting to push and back the horse off of the wire, and had placed the bit in its mouth and was holding on to the ring thereof, several of the strands of the guy wire became detached from the top of the pole, causing the guy wire to sag and come in contact with a live wire at a point below the insulation; the electricity was conveyed down the guy wire into the body of the horse, which was killed by the shock, and Bellah, who was holding on to the bit, received a severe shock which threw him violently to the ground, and as a result he has sustained very serious and permanent injuries. It appears that, when the strands in the guy wires became loosened and it sagged against the live wire, said guy wire remained at approximately the same angle from the pole as it had been originally placed, and the insulation was not, while it was held at such an angle, below the lowest live wire. The plaintiff insists that a breakage or pulling loose of the strands of the guy wire where it was attached to the pole should have been anticipated by the defendant, and that it was its duty to have so insulated the guy wire that, under any conditions which would cause a sagging of the wire, the insulation would nevertheless be at a point below a place of possible contact with the live wires. Appellant argues that there is no absolute duty upon defendant to insulate its guy wires in any particular manner, but that it is possible for the guy wires to be made so strong and to be placed so firmly in their position at a safe distance from the live wires that insulation would be unnecessary; in other words, that the relative positions of the wires themselves may furnish insulation by means of the intervening air. This is tacitly admitted by the respondent, who contends, however, that whether in the particular case the porcelain insulation was necessary and its absence negligence was a question of fact which was submitted to the jury under proper instructions, and that the jury has found by its verdict that the defendant was guilty of negligence in not insulating the guy wires at a point below the live wires in the same manner in which said guy wire was insulated at a point above the lowest live wire. Our conclusion is in agreement with this contention of the appellant. The duty of the appellant was not an absolute duty to insulate or make the wires safe in any particular manner. Its duty was to make the wires safe under all the exigencies offered by the surrounding circumstances. The strands of the guy wire were obviously either insufficient in strength or insufficiently attached to the pole to retain the guy wire at the proper angle from the live wires under the circumstances presented. Perhaps it was impracticable to make them sufficiently strong or sufficiently securely attached, but, if so, then appellant should have guarded against their breakage. Appellant realized this duty in guarding against breakage at the bottom, and yet it is apparent that the wire gave way more easily at the top than at the bottom when subjected to pressure from the bottom, the point at which it would seem most likely that pressure would be exerted. It therefore appears that this possibility should also have been anticipated and guarded against.

True, in reaching this conclusion the jury should take into consideration the nature of the country in which the pole was situated, the occupations of the persons living thereabouts, the usual precautions taken by electric companies under similar circumstances, and such matters. Fairbain v. Amer. River Electric Co., 170 Cal. 1115, 148 Pac. 788. The jury was instructed, however, in a manner which we think covered this matter. It was instructed at the request of defendant that the owner or operator of an electric plant is not an insurer against injury to other persons; that it has done all the law requires it to do if it has exercised the care in the matter of the construction and maintenance, operation, and inspection of its plant necessary so that the same will not be a source of danger or injury to persons lawfully in the pursuit of their business or

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pleasure; and that the care which the law exacts from any corporation engaged in operating such an instrumentality is always in proportion to the degree of danger reasonable to be apprehended from the use of the means employed. The jury has followed this instruction, we must presume, and has found that the danger of these strands breaking above or becoming detached from the pole was a danger reasonable to be apprehended. The jury had before them the testimony of Rudolph W. Van Norden, a consulting engineer, who stated that he was familiar with the usual custom of equipment, erection, and maintenance of power pole lines carrying high-tension currents, such as the lines of the defendant; that he was familiar with the construction of guy wires used in connection with such equipment; that there are ways and methods known to electrical men, especially electrical engineers, to guy poles in such a way that there is no danger to persons or property at the foot of the guy wire; and that methods of properly insulating wires were generally known to people skilled in the business before the 21st of April, 1916; that the danger of contact with a guy on which there is a circuit such as the circuit in this case, carrying 10,000 volts, would be obviated by inclosing a breaker or insulator in that guy wire at such a point that if contact between the guy wire and the circuit should occur from any cause whatever, the current could not follow down the guy wire and pass through a person in contact with the guy wire; that if the insulator were not at a point where the guy wire could not touch any power wire, so that there would be a continuation of the circuit to the ground, it would cease to be a safety device. It also appears from the record that the pole is located in a field planted with barley, and that the barley was planted right up to the line of the pole. The barley was being cut and horses were being used in connection with the cutting—all of which is a usual and necessary use of the land on which the pole is situated. We think that the jury was justified in concluding that the defendant should have anticipated that the guy wire might be subjected to sufficient strain by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire and a consequent sagging of the wire, and should have insulated its guy wires so as to avoid injury to others in the event of such an occurrence

[5] Counsel for appellant very ably argues that, even though the negligence of the defendant in not insulating its guy wires be admitted, yet such negligence was not the proximate cause of the injury to Bellah, and that such negligence would not have caused any injury to Bellah except for an independent intervening cause over which the defendant had no control, which was the struggles of the horse during Bellah's attempt to back him off of the wire, causing a breakage or detachment of the strands of the guy wire. We shall consider some of the authorities relied upon by appellant. In the case of Polloni v. Ryland, 28 Cal. App. 51, 151 Pac. 296, the court said quoting from a federal case:

"An injury that is not the natural consequence of negligence, and which would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated, is not actionable."

It is said in the case of Bank of Savings v. Murfey, 68 Cal. at page 462, 9 Pac. at page 847, quoting from Beach on Contributory Negligence:

"An act is the proximate cause of an event, when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and directed power producing the result. the causa causans of the schoolmen."

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Also, quoting from Cooley on Torts:

"If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action."

Was the entanglement of the horse in the wire an "independent cause that could not have been anticipated," as said in the federal case; or was it "in the natural order of things under the circumstances," or would the damage "in the ordinary course of events follow from the wrong," as said by our own Supreme Court? Appellant argues that it had no reason to anticipate such a happening. We think in view of the physical conditions of the country where the pole was situated and the use to which the land was put, the jury was justified in finding that the defendant had reason to anticipate an accident of the generad nature of the one that occurred in this case. It is not necessary that the defendant should have anticipated this precise accident. City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 879. The question of proximate cause was submitted to the jury under proper instructions.

[6] We cannot agree with the appellant that Bellah was guilty of contributory negligence. He had the right to assume that the guy wire was safe, either by reason of its strength or by reason of proper insulation. He was doing nothing unusual or foolhardy for a man charged with his duties as performing his work, in assisting the horse in disentangling itself from the wires.

[7, 8] Appellant further contends that the complaint has no express allegation that the plaintiff is an insurance carrier, and that it is only by such an allegation that plaintiff can bring itself within the terms of the law subrogating it to the rights of Bellah. The amended complaint alleges that prior to the 21st day of April, 1916, the plaintiff, by its policy of insurance in writing, did insure the said Max Flentge and his employees at the time of the making of the policy; that said policy was written under and in conformity with the terms of a certain act of the Legislature, designated as the "Workmen's Compensation, Insurance and Safety Act," etc. (St. 1913, p. 279). This allegation, under the law respecting insurance companies, carries with it an implied allegation that the plaintiff was an insurance carrier. The omission of an allegation necessarily implied from other allegations is immaterial. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39.

[9] Appellant also contends that there was a failure on the part of the plaintiff to prove that the policy of insurance which was introduced in evidence had been properly executed by the plaintiff company, and that therefore there was a failure of proof of the allegation that Bellah had made a lawful claim to the insurance company which is necessary, under the compensation act, to work a subrogation of the insurance carrier. The question arose over proof of the making of a lawful claim by Bellah. If it be true that proof of the execution of the policy was insufficient, there is yet sufficient proof that the company ratified its policy and paid the money to Bellah under said policy. Bellah's claim would be a lawful claim whether made under a policy which had been properly issued in the beginning, or which had been defectively executed by the agents of the company and afterwards ratified by said company. In either event the policy would be good, and the claim would be lawful. We think there was sufficient proof that a lawful claim had been made by Bellah and paid by the plaintiff company, to entitle the plaintiff to be subrogated to the rights of the injured man.

The other objections of the appellant we consider to be without merit and to require no discussion here. Counsel for appellant conceded upon the oral argument that if defendant was liable under the

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law the judgment was not excessive. It therefore appears that substantial justice has been done between the parties.

The judgment is affirmed.

We concur: Brittain, J.; Haven, J.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

SECOND DISTRICT. DIVISION 2.

FIDELITY & CASUALTY CO. OF NEW YORK

v.

LLEWELLYN IRON WORKS. (Civ. 2925.)*

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT IS VALID.

The Workmen's Compensation and Safety Act *held* constitutional.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

8. CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION ACT NOT VIOLATIVE OF FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION.

The Workmen's Compensation and Safety Act is not open to attack as violating the specific injunctions of Const. U. S. Amend. 14.

(For other cases, see Constitutional Law, Dec. Dig. §§ 245, 301.)

9. STATUTES—TITLE OF WORKMEN'S COMPENSATION ACT INCLUDES PROVISIONS AS TO SUBROGATION OF EMPLOYER.

The portion of the title of the Workmen's Compensation and Safety Act which reads "providing the means and methods of enforcing such liability" includes those provisions in the act subrogating the employer or insurance carrier to the employee's right of action for injuries caused by the negligence of another, and the subrogation provisions are not open to attack on the ground that they were not included in the title.

(For other cases, see Statutes, Dec. Dig. § 114[2].)

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Fidelity & Casualty Company of New York against the Llewellyn Iron Works. From judgment for plaintiff, defendant appeals. Affirmed.

Bowen & Bailie, Jones & Weller, and J. Crider, Jr., all of Los Angeles, for appellant.

R. P. Jennings, J. E. Shelton, and Parker & Collier, all of Los Angeles, for respondent.

THOMAS J. This is an action brought to recover damages for the death of one James F. Goldsmith by the alleged negligence of defendant. The case was tried by the court and a jury, who brought in a verdict

*Decision rendered, Aug. 19, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919. 184 Pac. Rep. 402.

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against the defendant for the sum of $10,000. The appeal is from the judgment so entered.

The facts, so far as material for our present purpose, are as follows: On July 24, 1914, James F. Goldsmith, the deceased, a painter, was accidentally killed by falling from a plank on which he was working, outside a window on the seventh floor of the Broadway Department Store building, in the city of Los Angeles, then under construction by Mr. Arthur Letts, as owner. Mr. C. B. Weaver was the general contractor in charge of the work, including the painting, and as such was the employer of said Goldsmith. The defendant had a contract for the installation of the elevators in the building, and was engaged in such work at the time of the accident. The elevator hatchways with which this case is concerned were five in number, located along the southerly wall of the building. These hatchways were all within one inclosure, formed by the wall of the building with a window opposite each hatchway on each floor, on the back, and a glassed-in framework on the front, with sliding doors. The glass was in process of installation at the time of the accident. In order to perform any work on the south wall of the building it was necessary for the workmen to reach this wall. This they did by erecting a staging within and extending across the hatchways. Up this wall in each hatchway is a pair of upright guiderails, between which are suspended heavy counterweights, which slide up or down contrary to the action of the elevator cage. One crew of men after another had so erected their staging and performed their work. Among these various workmen were plasterers, who plastered the walls of the shaft; carpenters, who put in the window casings; sheet metal men, who put in the metal window sills; glass workers, who put the glass in the front work; painters, who painted the window frames; and window painters, who stained the window sashes, each of whom, including Goldsmith, was engaged in doing a necessary and essential part of the building. Working simultaneously with these various crews were employees of defendant, engaged in the construction and installation of the elevators. At the time of the accident the only elevator which had been installed by defendant was elevator No. 5, the same being on the extreme right hand of a person looking into the hatchways from the floor space. Prior to the day of the accident, this elevator had been operated and used by defendant's employees for testing the same and for carrying up and down laborers and supplies in connection with defendant's work on this and the other four hatchways, and had been run, on the day of the accident, some four or five hours prior thereto. On the second day after being so employed by said Weaver, deceased went to the seventh story of said building, placed one end of a plank on a saw-horse on the floor space opposite hatchway No. 5, the plank extending over the hatchway between the two upright guiderails already referred to, through the open lower sash of the window on the wall side of the hatchway, and resting on the lower sill of said sash, so that about two feet of the plank projected out of the window and over the alley, seven stories below. On this board, and that particular portion thereof so extending over the alley, as aforesaid, the deceased stood and proceeded to paint. While so employed, and without any previous warning, said elevator descended, and at the same time the said counterweights ascended, striking the plank from the underside, causing deceased to fall therefrom to the alley below, resulting in his death.

The deceased left a widow and a minor child, who made claim for compensation for his death under the Workmen's Compensation Act (St. 1917, p. 831) of this state, against Arthur Lets and C. B. Weaver, as his employers, and against the Fidelity & Casualty Company of New York, plaintiff herein, their insurer. The Industrial Accident Commission, accordingly, on March 26, 1915, awarded compensation, and the said Fidelity & Casualty Company of New York, pursuant to the terms

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of its policy, assumed liability for the entire award, making the payments thereunder. Thereafter, joining Lets and Weaver as plaintiffs, this action was brought by the Fidelity & Casualty Company of New York for general damages, as hereinbefore set forth.

There was a demurrer to the complaint, which was overruled. In its answer defendant denied negligence, alleged one recovery—the award as made by the Industrial Accident Commission—precluding any other; that deceased was a trespasser, and, at most, a mere licensee; charged contributory negligence; and further alleged that the accident was caused by the negligence of the deceased. On the trial, Letts and Weaver were dismissed as plaintiffs. There was a motion for nonsuit, which was denied. There was a motion for a new trial, which was never passed upon by the trial judge, and hence, under section 660 of the Code of Civil Procedure, is deemed denied. The appeal here is from the judgment so entered.

Appellant urges as a basis for a reversal of the judgment: (1) Excessive damages given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict; (3) that the verdict is against law; and (4) errors of law occurring at the trial. It also specifies 138 assignments of error.

Referring to the point made as to excessie damages given under the influence of passion or prejudice, suffice it to say that no evidence upon which such statement is based has been called to our attention, and we have failed to find anything in the record from which such an inference could be drawn, or that would justify such a conclusion.

[1] The trial court, after instructing the jury that contributory negligence, if found, would bar recovery, gave certain instructions designated as "P," "Q," and "R. Appellant contends that the verdict of the jury was in "complete disregard of the foregoing instructions, and against the law declared thereby," and urges that "these instructions in effect required a verdict for defendant." Appellant insists, with commendable vigor, that—

"An examination of the evidence will show that every fact on which these instructions were predicated was shown without conflict, and if so a finding of contributory negligence and a consequent verdict for defendant were inevitable."

There is no doubt but that the instructions referred to were proper, were the facts as shown by the evidence in this case such as contended for by appellant; but, after an examination thereof, we are unable to agree with its statement of such facts. Beyond the pale of successful contradiction, we think, the record shows a very decided conflict on every fact upon which the said instructions were predicated. Upon these conditions there was no disregard by the jury of the court's instructions. There was evidence upon which the said instructions were predicated, and which, if believed by the jury, would have sustained a verdict for defendant; but, the jury having settled that conflict in favor of the plaintiff, this court cannot now disturb the judgment based thereon. Under these circumstances, it is obvious that discussion of the question as to whether instructions given by the court, right or wrong, became the law of the case, is unnecessary.

[2, 3] The next point urged by appellant is that of contributory negligence on the part of deceased. We are not able to agree with it in that contention. For instance, defendant contends that, even if its employees had seen the said plank, they would have no intimation that they might injure any one by moving the car. But we are compelled to conclude that the very fact of the known presence of the plank across the shaft was notice to defendant for further investigation of that fact, and such an investigation would have disclosed the presence of deceased on the outer end thereof, as before stated. It is also contended by defendant that there was an agreement between the employers that work-

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men should not use the shaft without notifying the foreman of defendant. But assuming such to have been the case, notice of that arrangement must be shown to have been given to deceased. There is not one word of evidence that this was done. The rule is, as we understand it, that an agreement as to the manner of doing work by an employer is not binding upon the employee unless the existence of such is brought home to him. Alabama Midland R. Co. v. McDonald, 112 Ala. 216, 20 South. 472; Brown v. Louisville, etc., R. Co., 111 Ala. 275, 19 South. 1001; Atchison, T. & S. F. Ry. Co. v. Plunkett, 25 Kan. 188. We are not informed of the existence of any rule of law which made it necessary for decedent to anticipate and guard against negligent acts of defendant. Morgan v. Robinson Co., 157 Cal. 348, 107 Pac. 695, and cases there cited; Herold v. Mathews, 179 Pac. 414. Although by looking up the shaft and seeing the plank, defendant's employees could not see the man, still, in contemplation of law, the man being where he was, was within the shaft, and, as already seen, care and further investigation would have disclosed his position at the place stated. At any rate, we are satisfied that the question as to whether or not deceased was guilty of contributory negligence in being on the outer end of the plank, and as to whether or not his being there was such as to endanger his safety, was one for the jury. McKune v. Santa Clara, etc., Co., 110 Cal. 480, 42 Pac. 980; Seller v. Market Street Ry. Co., 139 Cal. 268, 72 Pac. 1006; Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651; Fox v. Oakland, etc., Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Loftus v. P. E. Ry. Co., 166 Cal. 464, 137 Pac. 34.

[4] Appellant's next contention is that decedent was not its employee, but was the employee of an independent contractor, and that being such, he was a trespasser in the shaft at the time of the accident, or at the most a mere licensee, to whom defendant owed no duty, except that of not wantonly injuring him. Confronted with the record before us, we think this contention without merit. When we take into consideration the fact that in the cnstruction of a modern business block —and the Broadway Department Store building of Los Angeles is such a block—there are required, including many others, such artisans as plasterers, carpenters, glass men, sheet metal men, and interior finish men, all of whom, according to the evidence here, had necessary work to do on the south wall of this building, and were under contract to do such work, we are at a loss to understand by what line of reasoning a conclusion can be arrived at that the employees of defendant (also just as essential in their part of the construction of such a block) were doing a more necessary work, and a work of such importance that the other contractors and their employees could be treated as trespassers. How any one reading this record, not to say anything of those who saw the witnesses and heard their testimony, would arrive at any other conclusion than that both before and after the time of the ill-fated accident, several workmen were continually engaged in work in the elevator shaft or hatchways, including the one—No. 5—in which was the elevator that caused the accident, that no less than seven men were working in this very hatchway on the day of the accident, and further that this fact was known to defendant during all of said time, we are unable to understand.

[5, 6] Defendant asks what more it could have done than it did for Goldsmith's protection. From the record before us we are justified, we believe, in suggesting that the answer to that inquiry is that it does not appear that anything was done, or any precaution taken by defendant, for the safety of deceased. Indeed, it appears that the things which ordinary prudence would have suggested were omitted. Not even was the presence of the board in the hatchway investigated, nor was the board removed. Notwithstanding the fact that other men than deceased were actually working in this very hatchway at the time, to de-

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fendant's knowledge, no warning was given. This in itself constituted negligence which deceased could not anticipate, and which, under the law and the evidence as disclosed here, he did not assume. "The authorities seem clear * * * that an employee voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from the want of care of his employer." Morgan v. Robinson Co., supra.

[7-9] Appellant next urges, throughout some 37 pages of its opening brief, the point that the plaintiff corporation has no legal capacity to sue in this case. It is also urged among other things, that there is no proof that a lawful claim was made "in conformity with law"; that in the proceedings had before the industrial accident commission under the Workmen's Compensation and Safely Act defendant was not called upon to contest the question as to whether or not the claim was a lawful one, and whether or not a legal liability existed on the employer's part; that, if the award of the commission is made binding and conclusive by the terms of the act, then the provisions are unconstitutional, and, conversely, if the award is not binding, then no foundation was laid for plaitiff's right to sue, because there was no other evidence offered; that the provisions of said act in question violate specific injunctions of the Constitution of this state, and infringe also specific provisions of the Fourteenth Amendment to the Constitution of the United States; that the provisions of said act authorize a double satisfaction for the same tort; that the act contains more than one subject; and that the right of subrogation is not expressed in its title. We think, however, that the mere mention of these contentions will serve to make obvious their lack of merit. The constitutionality of the Workmen's Compensation and Safety Act has been upheld by the Supreme Court of this state in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, and practically all of the foregoing objections decided contrary to the contention of appellant here. The fact that the act does not specifically mention the matter of the subrogation of the employer, or his insurance carrier, to the rights of the injured employee, or, in the case of death, to the rights of the heirs or personal representatives, we think is immaterial. All that the act itself does is to provide that the payment of compensation shall be contingent upon the subrogation of the employer, or his insurance carrier, to the rights of the injured employee. This is a mere incident to the liability, or to the payment of compensation, and is included in the general language of the title of the act, and especially of that portion of the title providing for the creation of a liability. "The right to subrogation" is, we think, included within that portion of the title of the act which reads: " * * * Providing the means and methods of enforcing such liability." "Subrogation," under these conditions, is one of the essential steps necessary to the enforcement of such liability, and embraced within the title of the act. Does not this question of subrogation come within the purview of legitimate inquiry made by any person of ordinary intelligence? Would not such a person naturally be led to ask such questions as the following: What employers are compensated? Under what circumstances? Upon what conditions? What rights, if any do the employers surrender or acquire by reason of their having to compensate their employees? What are the methods by which the compensation is made to inure to the benefit of the employee? We think the answer to our own query must be in the affirmative; for, certainly all of the foregoing hypothetical questions are, undoubtedly, germane to the purpose expresed in the title. Citations might be multiplied, but the following will, in our opinion, serve to support our present conclusions: In re Schuler, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706; In re Maginnis, 162 Cal. 200, 121 Pac. 723; Matter of Yun Quong, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C, 969; Anglo-Califorian Bank v. Field, 146 Cal. 644,

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80 Pac. 1080; Gieske v. County of San Joaquin, 109 Cal. 489, 42 Pac. 446; Kings County v. Johnson, 104 Cal. 198, 37 Pac. 870; People v. Superior Court, 100 Cal. 105, 34 Pac. 492; San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Francais v. Somps, 92 Cal. 503, 28 Pac. 592; Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Massachusetts, etc., Co. v. San Francisco, etc., Ry. Co., 178 Pac. 974; Stackpole v. Pacific Gas & Electric Co., 184 Pac. —.

Appellant urges next that the court erred in giving certain instructions requested by plaintiffs, and in refusing to give certain other instructions requested by defendant. With this contention we are not able to agree. Having read every instruction given, as well as every requested instruction denied. we are of the opinion. (1) That the instructions given, objection to which is urged by appellant here, were ample, and as favorable to defendant—as disclosed by the record—as they properly could be on the questions presented. This is especially and obviously so. we think, when the instructions objected to are considered with, and in the light of, the other instructions given. (2) As to those denied, some were based upon a view of the case absolutely unsupported by the evidence, and therefore erroneous as a mater of law, while others had already been covered by instructions given at defendant's request, and also by the general instructions given by the court.

The remaining points urged, we think, need not be considered.

In our opinion the evidence is sufficient to support the verdict, and the verdict and judgment based thereon are, and each is, according to law.

Judgment affirmed.

We concur: Finlayson, P. J.; Sloane, J.

SUPREME COURT OF COLORADO.

YOUNGQUIST ET AL.

v.

INDUSTRIAL COMMISSION OF COLORADO ET AL. (No. 9460.)*

MASTER AND SERVANT—ON APPEAL UNDER WORKMEN'S COMPENSATION ACT, FINDINGS OF FACT SUPPORTED BY SUBSTANTIAL EVIDENCE CONCLUSIVE.

Where the state Industrial Commission, in a proceeding under Workmen's Compensation Act, found as a fact that a servant did not come to his death by reason of an injury received in the course of his employment, and the district court sustained such finding, the Supreme Court, in reviewing the proceedings on writ of error, cannot interfere with such finding, if it is supported by credible and substantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

En Banc.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

*Decision rendered, Oct. 6, 1919. 184 Pac. Rep. 381.

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Proceeding by Sophie Youngquist and another, under the Workmen's Compensation Act, to obtain compensation for the death of Andree Youngquist, opposed by Rowley Clark, doing business as the Clark Brick Company, the employer, and the London Guarantee & Accident Company, Limited. From a judgment, affirming and confirming an award of the Industrial Commission, denying compensation, applicants bring error. Affirmed.

Andree Youngquist (husband of Sophie Youngquist and father of Fredolph Youngquist) was employed on July 19, 1917, by the defendant brick company, and on that date was injured by falling brick at the company's place of business in Denver, Colo. A day or two after the injury he returned to work, and continued in the employ of the company for three weeks, at the end of which time he was taken to his bed with an illness from which he died one week later. The widow, for herself and minor child, filed with the defendant Industrial Commission her claim, under the Workmen's Compensation Act. Chapter 179, p. 515, Laws of 1915. Hearing was had thereon, and January 11, 1918, said claim was denied. A petition for rehearing was filed, which was denied February 26, 1918, and the findings and decree of January 11, 1918, upheld and established as the final decision of the commission. March 20, 1918, plaintiffs in error filed in the district court their complaint to review the action of said commission and set aside its findings. June 4, 1918, the cause came on for trial in the district court, a jury was waived, and the evidence theretofore submitted to the commission was introduced as the sole evidence before the court, which gave judgment, affirming and confirming the award of the commission. From this judgment the plaintiffs bring error.

H. W. Spangler and Nathaniel Halpren, both of Denver, for plaintiffs in error.

Leslie E. Hubbard, Atty. Gen., John L. Schweigart, Asst. Atty Gen. and William E. Hutton, of Denver, for defendants in error.

BURKE, J. (after stating the facts as above). The only question of importance in this case was:

"Did the deceased come to his death by reason of the injury above mentioned, or was the cause of death independent thereof?"

The commission found the latter. The district court sustained the finding, and if it was supported by "credible and substantial evidence," that judgment must stand. Industrial Commission v. Johnson, 172 Pac. 422.

"This court may consider only the legal question of whether there is evidence to support the findings." Passini v. Industrial Commission, 171 Pac. 369.

A careful examination of the evidence in the case before us discloses a conflict on the question of the cause of the death of the deceased, but that there is "credible and substantial evidence" which supports the findings of the commission cannot be doubted.

The judgment is therefore affirmed.

Scott, J., not participating.

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SUPREME COURT OF ILLINOIS.

BOWMAN

v.

INDUSTRIAL COMMISSION ET AL. (No. 12715.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE.

Under Workmen's Compensation Act, § 24, where employer knew all about accident to employe immediately thereafter, and within 30 days from the time of the accident authorized the payment by liability insurance company of doctor's bill for caring for the injury, the failure to give written notice within 30 days after the accident did not prevent recovery.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE.

The requirement of Workmen's Compensation Act, § 24, that a written claim for compensation be made within six months after payments have ceased, applies only where there is a continuation of the disability for which compensation has been agreed upon or awarded.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION —VESTED RIGHTS.

Workmen's Compensation Act, as amended by Laws 1917, p. 504, § 19, par. j, providing that proceedings instituted by an injured employe may be carried on in case of his death by his personal representative or beneficiary, changes the manner of procedure and practice, but did not in any way affect the vested rights of parties to a proceeding pending a time of its enactment.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

11 MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The Workmen's Compensation Act is to be so interpreted as effectively to remedy the ills intended to be remedied.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

12 MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE.

Under Workmen's Compensation Act, § 8, par. d, as to notice of claim where employee returns to work after the accident, if after returning to work the injured employee dies, his beneficiaries are not prevented from asserting claim for compensation if they file claim within 18 months after his return to employment.

(For other cases, see Master and Servant, Dec. Dig. § 398.

Error to Circuit Court, Macon County; William K. Whitfield, Judge. Proceeding under the Workmen's Compensation Act by Ray E.

*Decision rendered, June 18, 1919. Rehearing denied Oct. 10, 1919. 124 N. E. Rep. 373.

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McCormick, administrator de bonis non of the estate of Charles W. Musgrove, deceased, employee, opposed by James Bowman, employer. Award of arbitrator, in claimant's favor, being confirmed by the Industrial Commission, the employer brought certiorari, and the orders and finndings of the commission were quashed and set aside, and, the cause being certified as proper to be heard by the Supreme Court, the proceedings are brought up by writ of error by the administrator. Reversed and remanded.

Whitley & Fitzgerald, of Decatur, and John A. Walgren, of Chicago, for plaintiff in error.

McMillen & McMillen, of Decatur, for defendant in error.

CARTER, J. This was a proceeding brought under the Workmen's Compensation Act against defendant in error. The arbitrator found in favor of the claimant. On the petition for review before the Industrial Commission the award of the arbitrator was confirmed. On a writ of certiorari the proceeding was taken to the circuit court of Macon county for review, and the orders and findings of the Industrial Commission were quashed and set aside. The trial judge thereupon certified that the cause was one proper to be heard by this court, and the proceedings have been brought here for further review by writ of error.

Charles W. Musgrove an employee of James Bowman, doing business as Bowman Bros., in Decatur, Ill., while working as a night man in charge of the office, barn, and garage used in the taxicab, moving, and storage business, was injured on the night of May 24, 1916, by an accident arising out of and in the course of his employment, by being kicked by a horse in the barn. The evidence tends to show that by the kick his head was thrown against a brick wall, and as a result of the kick and hitting the wall a large number of his teeth were knocked out, and his face badly bruised and gashed, and he received internal injuries, which, according to the finding of the arbitrator and Industrial Commission, resulted in his death on August 6, 1917. He left a widow and two minor children and the widow subsequently died. Immediately after his injury Musgrove was treated by a physician, and thereafter his teeth were fixed by a dentist. The bills for these medical and dental treatments were paid in the usual course of the compensation program of the insurance company carrying the risk of the defendant in error, the doctor's bill being paid June 8, 1916, and the dentist's on December 2, 1916. Musgrove was absent from his work immediately after the injury less than a week, when he returned to his usual employment with defendant in error, the latter being short of help and needing him badly. His wounds seemed to have gradually healed, and he continued his work until some time in July, 1917, when the evidence tends to show that the accumulated effects of his injuries forced him to quit. He suffered a paralytic stroke on August 2, 1917, and died four days later, on August 6, 1917. He thus remained in his former employment until about a month before he died, and up to the time of his death the evidence tends to show he continued to hope that he might soon be able to return to work. During the same month in which he died his widow spoke to defendant in error about a claim for compensation, asking if he had his men insured. Defendant in error knew of his death and attended the funeral. September 14, 1917, the widow, as administratrix of his estate, filed with the Industrial Commission, on her behalf and that of her minor children, aged seven and nine years, respectively, the prescribed form of application for adjustment of claim under the Workmen's Compensation Act. No question is raised that the employer and employee were not within the provisions of the act at the time of the injury. Pending the hearing before the Industrial Commission the widow

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died, and Ray E. McCormick was substituted as administrator de bonis non of the estate of Charles W. Musgrove.

The decree of the circuit court found, among other things, that the Industrial Commission was without jurisdiction, for the reason that no claim for compensation was made within the limit of time provided for by section 24 of the said act; that paragraph (d) of section 8 and paragraph (h) of section 19 of the Workmen's Compensation Act were not applicable to the facts in this cause. Counsel for plaintiff in error argue that both paragraph (d) of section 8 and paragraph (h) of section 19 are applicable, and that the court was therefore wrong in quashing the orders and findings of the Industrial Commission.

[1] Counsel for defendant in error earnestly argue that the circuit court was right in ruling that the claim was not made within the limit of time provided for in secton 24 of the act, under the reasoning of this court in Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496, as no written claim was filed by any one "within six months after the accident." Section 24 also provides:

"That the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice principal in the enterprise."

The evidence in this record tends to show, without contradiction, that the defendant in error knew all about this accident immediately thereafter, and that within 30 days from the time of the accident he had authorized the payment by the insurance company of the doctor's bill for caring for the injury. There can be no question, therefore, under the decisions of this court, that the failure to give written notice within 30 days after the accident would not prevent the recovery in this proceeding. Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979 Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Conway Co. v. Industrial Board, 282 Ill. 313, 118 N. E. 705.

Paragraph (d) of section 8 of the Workmen's Compensation Act in force at the time of this accident (Laws of 1913, p. 342), read as follows:

"If, after the injury has been sustained, the employee as a result thereof becomes partially though permanently incapaciated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning or is able to earn, in some suitable employment or business after the accident. In the event the employee returns to the employment of the employer in whose service he was injured, the employee shall not be barred from asserting a claim for compensation under this act: Provided, notice of such claim is filed with the Industrial Board within eighteen months after he returns to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

[2-7] It is argued by counsel for plaintiff in error that the trial court improperly held that paragraph (d) of section 8 does not apply because there is no provision made that the beneficiaries of the employee may after his death file a claim for compensation within 18 months; that a plain reading of this paragraph clearly shows that it was intended that only the employee himself could file such claim. The argument of counsel for defendant in error in their brief is not quite to that effect, their position being that paragraph (d) was intended by the Legislature

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only to be applicable to cases arising under said paragraph, and not to cases arising under the other sections of the act; that a reading of section 7 of the Workmen's Compensation Act of 1913, together with section 8 and the rest of the act, shows that the Legislature intended by section 7 to provide compensation for death cases, and by section 8 only intended to provide for compensation to an employee for an injury not resulting in death; that the natural and appropriate office of the proviso of paragraph (d) was to restrain and qualify the matter immediately preceding it and to qualify the entire act; that to construe the act otherwise would be to limit the enacting clause itself, which is contrary to the general rule of construction. In re Day, 1881 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; Huddleston v. Francis, 124 Ill. 195, 16 N. E. 243. That this is the general rule there can be no question. With provisos, as with all other statements in the statute, the intention of the lawmaker is the law. "The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso. The intention expressed is paramount to form." Lewis' Sutherland on Stat. Const. (2d Ed.) § 352. The object of construing a statute is to ascertain and give effect to the intention of the Legislature. It is to be gathered from the necessity or reason for the enactment and the meaning of the words, enlarged or restricted according to their real intent. In seeking this intention the court will always have regard to existing circumstances, contemporaneous conditions, the object sought to be attained by the statute, and the necessity or want of necessity for its adoption. It must also have in mind the language used by the Legislature, the evil to be remedied, and the object sought to be attained. In construing a statute the court will not be confined to its literal meaning. A thing within the intention is regarded within the statute although not within the letter. A thing within the letter is not within the statute if it is not within the intention. When the intention has thus been ascertained from the reading of the statute, words may be modified or altered so as to obviate all inconsistencies with such intention. People v. Highway Comrs., 270 Ill. 141, 110 N. E. 347; Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341; Warner v. King, 267 Ill. 82, 107 N. E. 837.

[8] It is clear from reading section 24 with the other sections of the act that the Legislature intended to provide such notice of the injury as to prevent employers being liable for fraudulent claims without opportunity of investigating them before such lapse of time that the fraud could not be discovered, but that any inaccuracy or technical defect in the form of the notice would not be a bar; that the failure on the part of any person entitled to such compensation to give notice would not relieve the employer of his liability when the facts and circumstances were known to him or his agent or the one in charge and acting for him in such enterprise; that the requirement of section 24 that a written claim for compensation be made within six months after payments have ceased applies only where there is a continuation of the disability for which compensation has been agreed upon or awarded. Casparis Stone Co. v. Industrial Board, 278 Ill. 77, 115 N. E. 822.

[9] There can be no question that the clear intent of the Legislature was to provide compensation alike for death cases and for mere injury cases; that it did not intend that while there might be recovery on behalf of the employee if he lived, there could not be a recovery in favor of his widow and children if the injury caused his death. There can be no question that under paragraph (d) if Musgrove had lived he could have recovered if he had filed a claim at the time the claim was filed by his wife after his death. While the wording in paragraph (d) of the statute is not entirely clear on the question here under consideration, taking all the sections of this act together, including the purpose for which the act was enacted, it would seem most unreasonable to con-

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clude that the Legislature intended that if the injured person was able to return to work, and did so return, he would not be deprived of recovery for his injury if he did not give a written notice within six months after the accident, but could give it any time within eighteen months after he returned to work, but that if he died within such eighteen months, his wife, children, or other dependents could not give notice because there was no specific provision made for them so to do, and that therefore there could not be any recovery in their behalf. It would appear from other paragraphs of section 8 that the Legislature thought compensation should be paid after the death of the injured person, even though the claim was originally filed in his behalf, and as the Workmen's Compensation Act now reads as amended by the act of 1917, it is obvious that it was intended that if the proceedings were instituted by the injured person, and he died pending such proceedings, they could be thereafter carried on by his personal representative or beneficiary. Laws of 1917, § 19, par. j, p. 504. The Workmen's Compensation Act in force at the time this injury occurred did not contain paragraph (j), but did contain it at the time these proceedings were had in the lower court. The provisions of said paragraph changed the manner of procedure and practice, and do not, in our judgment, in any way affect the vested rights of any of the parties, therefore that paragraph may be held to be in force at the time of this hearing. People v. Clark, 283 Ill. 221, 119 N. E. 329, and cases there cited.

[10-12] The intention of the law, in our judgment, on this question must be gained by reading the entire act and all its provisions. Where the intention is doubtful, arguments on the ground of absurdity and injustice will be considered, and ambiguous language will be construed so as to reach a reasonable result and prevent hardship or injustice. Wendzinski v. Madison Coal Corp. 282 Ill. 32, 118 N. E. 435. The act is to be so interpreted as effectively to remedy the ills intended to be remedied. City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. The law is intended for the protection of workmen and their families. It is intended to afford machinery by which the burdens of injuries sustained by those who do the actual work of a business and are not themselves employers, with a duty of insurance under the act, may be socially distributed and borne by society in general. In re Rheinwald, 168 App. Div. 425, 153 N. Y. Supp. 598. It is manifest that the act intended that the dependents of injured persons should be provided for, and the Legislature certainly never intended that such dependents could not be provided for simply because it did not specifically designate the time allowed to them to give notice of the claim of the injury. Giving to paragraph (d) a reasonable construction in the light of the other provisions of the act, we think that the Legislature intended that if the injured employee should return to work, and should thereafter die, his beneficiaries could not be prevented from asserting a claim for compensation if they filed a claim within eighteen months after the injured person returned to such employment. This construction is surely in accord with the spirit and purpose of the entire act.

Counsel for defendant in error argue that the reasoning of this court in Bushnell v. Industrial Board, supra, is in conflict with this conclusion. The particular question just discussed in this case as to the construction of the Workmen's Compensation Act was not considered or in any way referred to in that case. Moreover, the facts in that case were entirely different from those here under consideration. We do not think, therefore, that the decision in that case has any bearing on the construction of this statute on the point here involved. The employer here knew of the accident at the time it occurred, and waived, by his action in paying the claims of the doctor and dentist, a written notice within 30 days. It is clear, also, that he knew of the condition of his employee up to the

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time of his death and knew of his death. He was therefore in no way injured by lack of notice before the time that the widow of Musgrove filed her claim with the Industrial Commission. We think, therefore, that the provision of paragraph (d) covers this case, and that the claim was filed within the time provided thereunder, and that the circuit court was wrong in quashing the orders and findings of the Industrial Commission making an award for claims.

The holding that paragraph (d) of section 8 applies to the facts in this case renders it unnecessary to consider or pass upon the question argued by counsel for plaintiff in error that paragraph (h) of section 19 also applies to the facts in this record.

The decree of the circuit court will be reversed and the cause remanded for further proceedings in harmony with the views herein set forth.

Reversed and remanded.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

HARTSOCK ET AL.

v.

LONG ET AL. (No. 10543.)*

1. MASTER AND SERVANT—NOTICE TO INSURER OF AGREEMENT FOR LUMP SETTLEMENT UNNECESSARY.

Notice to or knowledge of the insurance carrier of an agreement for a lump sum settlement, presented to the Industrial Board for approval, is not contemplated by the Workmen's Compensation Act, §§ 43, 57, 73, 74, and want of such knowledge is not ground for vacating the order of settlement.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—AGREEMENT FOR LUMP SETTLEMENT SET ASIDE ONLY FOR FRAUD OR MISTAKE.

An agreement and order for a lump sum settlement made between the parties to a workman's compensation case will not be set aside and vacated in the absence of a showing of fraud, mistake, or gross irregularity.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act, by Mrs. Walter Long and others against Frank L. Hartsock and others. From an order of the Industrial Board denying the petition of the Southern Surety Company, insurance carrier, to set aside a lump sum settlement approved by the board, the insurance carrier appeals. Order of the Industrial Board affirmed.

*Decision rendered, Oct. 17, 1919. 124 N. E. Rep. 509.

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Landers McKay, Turner & Merrell, of Indianapolis, for appellant.
James M. Berryhill, of Indianapolis, for appellees.

NICHOLS, P. J. This is an appeal from the Industrial Board of Indiana. The substantial facts are as follows:

Walter Long, 31 years old, was killed by a train while he was driving a wagon belonging to his employer, Frank Hartsock, in the line of employment. His widow, Mrs. Walter Long, and a son, Wilbur Long, 12 years old, were his dependents. The wages of the deceased were $20 per week, and the award of the Industrial Board was $11 per week for 300 weeks, upon an agreement by the employer and the employee's dependents. After the payment of the weekly allowance for 49 weeks, an agreement for a lump sum settlement or redemption of remaining unpaid sum was entered into by and between the employer and the dependents of the deceased employee, which agreement was presented to the Industrial Board for its approval, which was granted, and the board fixed the amount by which the remaining 251 weeks of compensation should be redeemed by payment of cash in lump sum at $1,286.17 for Mrs. Walter Long, and $1,286.17 for Wilbur Long, or $2,572.34 in all. Thereupon appellant, Southern Surety Company insurance carrier, filed a petition praying that the lump sum settlement agreement be set aside, stating as reasons: (1) That the case is not extraordinary or unusual within the meaning of section 43 of the Workmen's Compensation Act (Laws 1915, c. 106); (2) that the Southern Surety Company had no knowledge of nor was it a party to such agreement. The board heard the evidence upon this petition, and found that the same should be denied. This appeal was then prayed and granted. The errors alleged by appellant are that the rulings and findings of the Industrial Board upon which said order is based are contrary to law, and that its order is contrary to law.

It is to be observed that appellant did not claim before the Industrial Board that there was any fraud or mistake by any one or that its rights, so far as the amount of compensation was concerned, had been transgressed; nor does it so claim on this appeal. The only challenge that we are called on to consider is that the findings and order of the Industrial Board are contrary to law; that is, that they are contrary to the general principles of the law as applied to the facts. Candy v. Hanmore, 76 Ind. 125, 128. After hearing the evidence, the Industrial Board, by its general finding, found against appellant on its averment that the case was not extraordinary or unusual within the meaning of section 43 of the Workmen's Compensation Act, thus finding the ultimate fact with the appellees. While the questions presented on appeal do not require us to review this finding, we have examined the evidence, and in our opinion it fully sustains the board's finding.

[1, 2] The only other reason given by appellant in its petition to set aside the order of the board fixing a lump sum in settlement was that it "never had knowledge of nor was a party to the agreement for a lump sum settlement." Such notice to or knowledge of the insurance company is not contemplated by the Workmen's Compensation Act. Section 43, 57, 73, and 74, Compensation Act; Acts 1915, p. 392. And such agreement and order of settlement will not be set aside and vacated in the absence of a showing of fraud, mistake, or gross irregularities. Ætna Life Ins. Co. v. Shively, 121 N. E. 50. The finding and order of the board was therefore not contrary to law for this reason. We find no error.

The order of the Industrial Board is affirmed.

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SUPREME COURT OF IOWA.

BACH

v.

INTERURBAN RY. CO. (No. 31860.)*

MASTER AND SERVANT—SETTLEMENT UNDER WORKMEN'S COMPENSATION ACT, APPROVED BY COURT, CANNOT BE REVIEWED.

Where a claim by the widow of an injured employee was voluntarily settled pursuant to the provisions of the Workmen's Compensation Act, and the district court, under Code Supp. § 2477m33, approved the settlement, *held*, that the Supreme Court was without jurisdiction of an appeal therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 418[2].)

Appeal from District Court, Dallas County; W. H. Fahey, Judge. Supplemental opinion on rehearing. Appeal dismissed.
For former opinion, see 171 N. W 723.

C. Woodbridge, of Des Moines, for appellant.
Stipp, Perry, Bannister & Starzinger, of Des Moines, for appellee.

PRESTON, J. The question as to the jurisdiction of this court was the last, or one of the last, propositions argued by counsel for appellee in their brief on the original submission, and should doubtless have been taken up first in the opinion. The point is again pressed by appellee on rehearing, and we have concluded to base our decision on that question, because, if the case is not properly here, we should not pass upon the merits. That part of the opinion, near the end of the statement of the case, following the words, "The court is unable to see any legal reason for withholding approval of said settlement," to the end of the opinion, is withdrawn, and the reporter will omit such part withdrawn from the official report. In lieu thereof, the following is substituted:

The abstract recites:

That on the 24th day of November, 1916, counsel for the plaintiff prepared and presented to the court a decree, which the court signed, and the same was filed of record on November 24, 1916.

Then follows the decree approving the settlement. On the original submission, the appellee made the point, which was timely, that the court is without jurisdiction to entertain the appeal, or to interfere with the proceedings had in the court below, because:

A. Where a claim is voluntarily settled, pursuant to the terms and provisions of the Compensation Act, and is approved by the Industrial Commissioner, it is mandatory upon the district court of the county wherein the injury occurred to enter a decree in accordance with and to effectuate the memorandum of settlement. What the statute declares the district court must do, there can be no error in doing. Hence the decree rendered in accordance with the memorandum of settlement is not appealable, and this court is without jurisdiction, citing Code Supp. 1913, § 2477m33.

*Decision rendered, Oct. 23, 1919. 174 N. W. Rep. 333.

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B. There is no provision in the Compensation Act for a review of a settlement made pursuant to its terms, except only:

(1) By a review before the Industrial Commissioner (at least in the first instance), and then only

(2) "If the commissioner finds the condition of the employee warrants such action." Section 2477m34.

And appellee contended that there was no change in the condition of the employee, and could not be, because he was dead. They say therefore, that the present appeal does not lie, and the court has no jurisdiction to consider the appeal.

C. There is no provision in the Compensation Act for an appeal from a decree effectuating a memorandum of settlement, voluntarily entered into by the parties, the terms of which are in accordance with the schedules and provisions of the Compensation Act. Sections 2477m25 and 2477m33.

D. There was nothing done in the court below from which, under the statute, an appeal will lie.

E. The parties to a cause cannot, by acquiescence or consent, confer jurisdiction upon this court, for that an appeal will be only from an entered final judgment or order, affecting substantial rights.

F. There is no appealable decree in the case at bar. It is again urged by appellee that this court cannot reverse a decree which it affirmatively appears was never entered of record, and that the matter was duly called to the attention of opposing counsel and the court in due time.

Appellant contended that this court did have jurisdiction, and cited Const. Iowa, art. 5, § 4; Western Indemnity v. Pillsbury, 170 Cal. 686, 151 Pac. 398-405; Great Western Power v. Pillsbury, 170 Cal. 180, 149 Pac. 35; Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436; Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; In re Employers' Lia. Assur. Co., 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; also Code, § 4100, which provides that the Supreme Court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law; also Code, §§ 4101, 4102, which provide that appeal may be taken to the Supreme Court not only from a judgment of the court in ordinary proceedings, but from all orders that affect the rights of the parties, either in an ordinary or special proceeding. They also cite Code Supp. § 2477m33, which provides, after a compensation award is converted into a decree, it "shall have the same effect, and in all proceedings in relation thereto, shall thereafter be the same as though rendered in a suit duly heard and determined by said court."

It is further argued by appellant that appellee, having brought this suit in equity, and asked for judgment in the district court, she is in no position to deny the jurisdiction of this court to review the judgment of the court below, and that the question has been settled in other jurisdictions, to the effect that the appellate court does have the right, except on fact, and that the cause is triable de novo here, citing Code, § 3652. In answer to appellee's contention that the award filed in the district court, and the decree entered in accordance therewith, is mandatory, they say that the district judge is not a mere ministerial officer, and that in the case of In re Employers' Lia. Assur. Co., supra, the court decided this question, saying of a similar provision:

"This means such a decree as the law requires upon the facts found by the board. It does not make the action of the superior court a mere perfunctory registration of approval of the conclusions of law reached by the Industrial Accident Board. * * * The obligation placed upon [this] court * * * is to exercise its judicial function by entering such decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record."

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And they say, if the district court fails to do this, then the Supreme Court has jurisdiction to do so. The scope of such a hearing under our statute was determined in Griffith v. Code Bros., 165 N. W. 577, L. R. A. 1918F, 923. Appellee cites, in support of his contention, the case of Martin v. Martin, 125 Iowa, 73, 99 N. W. 719, and we think, under the record in this case, and under the law, this case is ruled by the decision in the Martin Case. We are not disposed to review that case, and discuss again the reasons therein given for dismissal.

The appeal is dismissed.

Ladd, C. J., and Evans and Salinger, JJ., concur.

SUPREME COURT OF IOWA.

SOUTHERN SURETY CO.

v.

CHICAGO, ST. P., M. & O. RY. CO. (No. 32973.)*

2. MASTER AND SERVANT—RIGHT TO INDEMNITY FROM WRONGDOER UNDER WORKMEN'S COMPENSATION ACT.

Under the provisions of Workmen's Compensation Act in Code Supp. 1913, § 2477m6, providing that party paying compensation shall be entitled to indemnity from wrongdoer other than employer, the amount of compensation paid by an insurance carrier to an injured employee cannot be recovered by the insurer from the actual wrongdoer, from whom the employee recovered full damages before payment of compensation.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

Action to recover from a wrongdoer the amount paid by an insurance company for personal injuries sustained by an employee, for which the employer became liable under the Workmen's Compensation Act. Demurrer to plaintiff's petition was sustained. Opinion states the facts. Plaintiff appeals. Affirmed.

Oliver, Harding, Oliver & Royal, of Sioux City, for appellant.

Jepson & Struble, of Sioux City, for appellee.

GAYNOR, J. On the 21st day of June 1918, the plaintiff filed its petition in the district court in which it alleges: That on the 8th day of March, 1916, one W. W. Whitney, then in the employ of Philip Bernard Company, was injured while in the course of his employment; that the injury sustained by Whitney was caused by the negligence of the defendant herein; that thereafter the said Whitney brought an action against this defendant, in which he recovered the sum of $2,300, and this sum was paid to Whitney by the defendant company; that on or about March 1, 1916, and for some time prior thereto, this plaintiff had insured the Philip Bernard Company against any liability which might arise out of any injuries received by its employees in the course of their employ-

*Decision rendered, Oct. 16, 1919. 174 N. W. Rep. 329.

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ment, and for which Philip Bernard Company would become liable under the provisions of the Workmen's Compensation Act of 1913 (Acts 1913, c. 147) and supplement thereto; that plaintiff, under this insurance obligation to Philip Bernard Company, paid to Whitney the sum of $572.33 in compensation for loss of time and the necessary medical expenses incurred by him under the provisions of the Workmen's Compensation Act. The plaintiff claims that the defendant company, who was the wrongdoer and caused the injury, is now liable to this plaintiff, the insurer, for the money which it paid to Whitney under its insurance obligation, and it sets out and relies upon section 2477m6, Code Supplement 1913, and prays judgment against the defendant for the amount paid.

The defendant appeared and demurred to plaintiff's petition on the following grounds:

First. Because it appears from said petition that this action is brought to recover for personal injuries sustained by one W. W. Whitney on the 8th day of March, 1916, and the action was not begun until more than two years after said date, and said action is now barred by the statute of limitations.

Second. Because it appears from said petition that the plaintiff was surety for the Philip Bernard Company, the employer of Whitney, and its rights are determined by the Workmen's Compensation Act as found in section 2477m6 of the Supplement of the Code of 1913. This section reads as follows:

"Where an employee coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

"(a) * * * The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

"(b) * * * If the employee or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover therefor."

It further appears from said petition that Whitney proceeded against the defendant, the actual wrongdoer, and recovered the full amount of his damages from it, and for this reason the plaintiff cannot now recover anything of this defendant, but must recover from Whitney the amount of compensation alleged by it to have been paid to him.

Third. Because under the facts disclosed in this petition the plaintiff cannot now recover of this defendant any sum of money paid by it to Whitney because of full payment made to Whitney of said claim, as disclosed by said petition, and it must therefore recover, if at all, from said Whitney.

This demurrer was sustained generally, and the plaintiff, electing to stand on its petition, and not to plead further, judgment was entered against the plaintiff for costs and its petition dismissed. From this the plaintiff appeals.

[1, 2] The question submitted to us is: Whether or not this demurrer is good on any of the grounds presented. If it it is good on any of the grounds, the court did not err in sustaining it. It involves only the proper construction of section 2477m6 of the Workman's Compensation Act. It is apparent from the statute that, when Whitney received his

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injuries, he was entitled to proceed against his employer under this act. He was entitled to receive from his employer the compensation which is provided for in the act. We must assume that the injury occurred under such circumstances that Whitney's employer was liable to him under the act. We must assume that the compensation paid to Whitney was paid in accordance with the act. The compensation which Whitney became entitled to from his employer, or from this insurance company, rested upon a contractual obligation to pay for injuries received under the circumstances provided for in the statute. When an injury is received under circumstances rendering the employer liable to the injured party under the statute, nothing is left for the employer to do but to make compensation. This compensation is required to be made, though the employer is in no way negligent, and in no way liable at common law for damages. The compensation is purely statutory, and the amount of compensation is fixed by the statute. Its provisions are for the protection of the workingman as between him and his employer, and in no way affects or controls the right of the injured party to proceed at common law against the actual wrongdoer.

In an action at common law, the injured party is entitled to recover all that the common law recognizes as proper to be recovered in suits of that kind. This includes compensation for the injury, loss of time, medical care, and treatment, and all other injuries which are shown to flow as a proximate result of the wrong done. The fact that the injured party proceeded against his employer, and secured compensation under the act, cannot be pleaded by the wrongdoer when suit at common law is instituted against him. He is liable for the full amount of the damage regardless of any rights the injured party has against his employer, or may have had under the act. Nowhere in the act does it say that the amount of recovery against the actual wrongdoer shall be diminished, in any degree, by the fact that the injured party has received, or may receive, compensation for some of the wrong, through his employer, under the act. The obligation of the wrongdoer is the same as if there were no Workmen's Compensation Act. Compensation is one thing, and damages another. He recovers from the wrongdoer all the damages that he sustained by reason of its wrongful act. He recovers only such compensation from his employer as is provided for in the statute. The statute does not say that the amount which the wrongdoer is required to pay to the injured party shall be reduced by the amount of compensation paid under this act. It says that the amount of compensation shall be reduced by the amount recovered as damages at common law from the party that caused the injury.

Now let us see where we are at: The injured party brings an action, at common law, against the actual wrongdoer, and recovers for all the wrong, presumably, he has suffered. This included compensation for medical services, for loss of time, and other matters provided for in the act; but his right to recover is not limited in amount by the provisions of the act as to any of these matters. The wrongdoer must discharge its entire obligation to the injured party, and pay him for his injuries, loss of time medical and surgical treatment and all matters which flow as a proximate result of its wrong. If it does this, the injured party is made whole. If this is done before any claim is made under the act, he has no claim for compensation. He has received compensation. If, before recovery from the wrongdoer, he has received compensation from his employer, he must return it. It is true that the statute says that the employer or person making the compensation, shall be indemnified from the person liable to pay damages. This indemnity may come through an action by the injured party against the wrongdoer for damages, or it may come through an action by the employer against the wrongdoer under the right of subrogation. The employer may then recover all that his employee could recover. There is but one wrong, and there can be but one action.

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At the time this action was commenced, this defendant owed Whitney nothing. It had made full reparation for the wrong it had done. There were no rights left Whitney against this company, to which this plaintiff, or the employer, could be subrogated. There was one action to recover for the wrong. There cannot be another. The wrong was indivisible, and the right to bring the action was vested in Whitney, and the right of plaintiff rested in subrogation to that. Whitney is not entitled to receive double compensation. Had the employer discharged his obligation to Whitney under the act, and it had been made to appear that this defendant was the negligent cause of the injury, then the employer, or the person who made the payment required by the act, would be subrogated to all Whitney's rights against the wrongdoer. It might have proceeded against the wrongdoer and recover the full amount, which, at common law, was recoverable against the wrongdoer, just the same as Whitney could have done and did. Out of this it could reimburse itself for the amount advanced. The sum thus received at common law, over and above the amount necessary to reimburse itself, would belong to Whitney, the injured party.

We need not proceed to consider the other questions raised by the demurrer. Defendant discharged its full obligation to Whitney. There was nothing to which Whitney's employer, or the insurance company, could be subrogated. Whitney had no rights left against this defendant, and there was none to which the plaintiff could be subrogated. For this reason alone the action of the district court in sustaining the demurrer must be upheld.

Affirmed.

Ladd, C. J., and Weaver and Stevens, JJ., concur.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BERKSHIRE.

ECKERT'S CASE.

IN RE TOWN OF LEE.

IN RE EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED.*

MASTER AND SERVANT—PLAINTIFF NOT SERVANT, BUT "INDEPENDENT CONTRACTOR" WITH TOWN.

Claimant for compensation under the Workmen's Compensation Act, who contracted with a town to furnish a team and feed it, and to drive the horses, for a fixed daily remuneration, subject to orders of town's foreman as to where to go for ashes for use on a public way, and after they had been loaded, in which work he took no part, as to where he should dump them, was not an employee of the town, within the act, but an "independent contractor."

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

*Decision rendered, Oct. 10, 1919. 124 N. E. Rep. 421.

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Appeal from Superior Court, Berkshire County.

Proceeding by Wright Eckert for compensation under the Workmen's Compensation Act, opposed by the Town of Lee, the employer, and the Employers' Liability Corporation, Limited, the insurer. Compensation was denied by the Industrial Accident Board, the denial affirmed by the superor court, and claimant appeals. Decree dismissing claim affirmed.

Burns, Cummings & Rosenthal, of Pittsfield, for claimant.

Sawyer, Hardy, Stone & Morrison, of Boston, (Gay Gleason, of Boston, of counsel), for insurer.

BRALEY, J. The undisputed facts shown by the record and found by the Industrial Accident Board are that at the time of the injury the claimant with his team was hauling a load of ashes for the town of Lee to be used in the construction of a public way. It was provided by his contract of employment that he should furnish the team, feed, take care of and drive the horses for a fixed daily remuneration. The entire management and mode of transportation were under his control and the only orders given by the town's foreman were to direct him where to go for the ashes and after the ashes had been loaded, in which work he took no part, to dump the ashes at a designated place. It is plain as matter of law under McAllister's Case, 229 Mass. 193, 118 N. E. 326, Centrello's Case, 232 Mass. 456, 122 N. E. 560, and Winslow's Case, 232 Mass. 458, 122 N. E. 561, that when injured he was not an employee of the town but an independent contractor.

It having been rightly held and ruled by the board that there could be no recovery under St. 1911, c. 751, and amendatory acts, the decree dismissing his claim for compensation must be affirmed.

Ordered accordingly.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

WORCESTER.

GILBERT.

v.

WIRE GOODS CO.*

1. MASTER AND SERVANT—WAIVER BY EMPLOYEE OF COMMON-LAW RIGHTS.

Under Workmen's Compensation Act, pt. 1, § 5, an employee waives his common-law right to recover for injuries, unless, when the employer elects to come under the act, the employee gives him the required notice, claiming common-law rights, even though the employer fails to comply witih part 4, §§ 20, 21, as amended by St. 1912, c. 571, § 16.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

*Decision rendered, Oct 10, 1919. 124 N. E. Rep. 479.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT APPLIES TO MINOR.

The provisions of the Workmen's Compensation Act apply to an employee who is a minor, in view of the definition of "employee" in part 5, § 2, despite part 2, § 14.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

Report from Superior Court, Worcester County; Nelson P. Brown, Judge.

Action of tort by L. Hazel Gilbert against the Wire Goods Company, resulting in verdict for defendant. On report to the Supreme Judicial Court. Judgment ordered for defendant.

Frank W. Morrison, of Worcester, for plaintiff.

Charles C. Milton and Frank L. Riley, both of Worcester, for defendant.

CROSBY, J. This is an action of tort at common law to recover for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant. A judge of the superior court directed a verdict for the defendant and reported the case to this court.

Th plaintiiff entered into the employment of the defendant in August, 1910, and continued in such employ until the date of her injury, July 5, 1916. She was born October 10, 1891. The defendant became a subscriber under the Workmen's Compensation Act on July 1, 1912, and continued as such up to and including the date of the plaitiff's injury. On July 1, 1912, it posted printed notices, in form and substance as required by St. 1911, c. 751, part 4, §§ 20 and 21, and in the manner approved by the Industrial Accident Board and in accordance with rule 1 adopted by the board to take effect on July 1, 1912, at the principal entrance to the factory, through which the plaintiff passed in going to and from her work, in the corner of the room where she was employed, and in each room where employees worked, and they remained in position up to and including the date of the plaintiff's injuries. Pecott's Case, 223 Mass. 546, 549, 112 N. E. 217. Neither the plaintiff, nor her parent as her natural guardian, ever read the notices, or had knowledge of their contents, or was served with notice that the defendant was a subscriber under the act, otherwise than by the notices so posted; and neither the plaintiff nor her parent ever expressly in writing or orally waived her common-law rights, and no notice in writing claiming such rights was ever given by either of them to the defendant.

In Young v. Duncan, 218 Mass. 346, 106 N. E. 1, it was held that under part 1, § 5, the employees is held to have waived his common-law rights if he fails to give notice at the time of his contract of hire," and that this provision of the statute is not dependent upon any other condition or circumstance and "is not made to rest upon knowledge or notice to him of the fact that the employer is a subscriber."

As the plaintiff entered the defendant's employ before it became a subscriber, the question to be decided is not the same as that presented in Young v. Duncan, supra. Section 5 provides that, if the contract of hire was made before the employer became a subscriber, the employee shall be held to have waived his right of action at common law to recover damages for personal injuries, if he shall not have given such notice within 30 days of notice of such subscription.

[1] We are of opinion that the construction put upon section 5 by this court in Young v. Duncan, supra, applies in principle to employees whose contract of hire began before the employer became a subscriber, and that in either case it is plain that the employee waives his common-

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law rights to recover for personal injuries unless he gives his employer the required notice.

It was said in Young v. Duncan, supra, 218 Mass. at page 352, 106 N. E. at page 4, with reference to section 5, part 1.

"It simply establishes a status between subscribers under the act and their employees in the absence of express action by the latter manfesting a desire to elect a diffrent status."

See King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170.

Although the record shows that the defendant seasonably gave the notice referred to by part 4, §§ 20 and 21, as amended by St. 1912, c. 571, § 16, still failure to comply with those sections would not avail the plaintiff nor affect her rights under section 5. In referring to section 21, it was said in Young v. Duncan, supra, 218 Mass. at page 350, 106 N. E. at page 3:

"This is a direction to the employer, but failure to comply with it does not carry with it any penalty either to him or to the employees, except that it may involve some consequences to the employer as shown by section 22."

See Frier's Case, 232 Mass. 181, 183, 122 N. E. 195.

[2] The remaining question is. Do the provisions of the Workmen's Compensation Act apply to an employee who is a minor? The word "employee" as used in the act is defined in part 5, § 2, as follows:

" 'Employee shall include every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is * * * not in the usual course of the trade, business, profession or occupation of his employer. * * * "

The title to the act and its provisions in general show that it relates to payments to "employees" for personal injuries. The definition does not in terms exclude minors, but on the contrary includes "every person in the service of another under any contract of hire," with the exception of certain persons specifically described. Children and minors are expressly recognized in the act—in part 2, § 7, cl. C, as amended by St. 1914, c. 708, § 3. Under part 2, § 22, as amended by St. 1914, c. 708, § 8, the Industrial Accident Board is authorized in its discretion to provide for the payment of a lump sum to a minor who has received permanently disabling injuries. See also St. 1915, c. 236.

If a minor is not within the terms of the act and therefore not bound by them, it would follow that the insurer would be relieved from making payments thereunder to a minor employee if the contract of hire was made before he became of full age. To reach such a conclusion would result in great hardship. It would not be in accord with the language of the act or in harmony with its humanitarian purposes which were to cure the defects of previously existing remedies and to provide adequate and just protection to employees against injuries, and relief in case of accidents.

Part 2, § 14, provides that—

"If an injured employee is mentally incompentent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege."

This section does not deprive a minor of his rights under the act; it simply authorizes his guardian or next friend to exercise similar rights and privileges in his behalf.

In accordance with the terms of the report, judgment is to be entered for the defendant.

So ordered.

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SUPREME COURT OF MICHIGAN.

ADDISON

v.

W. E. WOOD CO ET AL. (No. 35.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION FOR LOSS OF LEG COMMENCES WITH AMPUTATION AND NOT WITH INJURY.

Where injured employee's leg was amputated after employee had received hospital and medical services under Workmen's Compensation Act, pt. 2, § 4, and compensation for total incapacity for 54 weeks from date of accident under part 2, §§ 3, 9, the 125-week period during which employee was entitled to compensation for loss of leg under part 2, § 10, subd. 14, commenced with day of amputation, and did not date back to accident; the provisions of latter statute not having become applicable until leg was amputated.

(For other cases, see Master and Servant, Dec. Dig. § 385[7].)

Certiorari to Industrial Accident Board.

Proceeding under the Workmen's Compensation Act for compensation for injury by Frank Addison, opposed by the W. E. Wood Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. Award of Industrial Accident Board for employee, and employer and insurer bring certiorari. Affirmed.

Argued before Bird, C. J., and Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.
George G. Hunter, of Ovid, for appellee.

STEERE, J. On November 5, 1915, Frank Addison, appellee, suffered an accident while in the employ of defendant W. E. Wood Company, causing a comminuted fracture of the middle third of both bones of the lower right leg. It is undisputed that the injury arose out of and in the course of his employment, and resulted in at least temporary total incapacity for work.

The customary course of proceedings under the Workmen's Compensation Law (Pub. Acts 1912 [Ex Sess.] No. 10; Comp. Laws 1915, § 5423 et seq. was followed promptly, and on December 3, 1915, appellant insurance company representing as insurers the Wod Company, entered into an agreement with Addison for incapacity compensation, on a form prescribed by the Industrial Accident Board, "at the rate of $10 per week during disability," which was filed with and approved by the board.

Immediately after the accident Addison was taken to a nearby hospital for emergency treatment. Dr. A. C. Hall, a specialist in traumatic surgery acting in behalf of appellants, at once took charge of the case, and later removed the injured employee to Harper Hospital, where he was furnished all needed medical and hospital services, medicine, etc., for approximately one year, during which time he was under Dr. Hall's

*Decision rendered, Oct. 6, 1919. 174 N. W. Rep. 149.

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care and treatment, with all expenses borne by defendants, receiving in addition thereto $10 per week from the insurer as provided in their agreement, and a further $5 per week contributed by the W. E. Wood Company. He became dissatisfied with the medical services of Dr. Hall, and, declining to permit further treatment of his injury by him, selected another physician, who immediately transferred his patient to a different hospital, and soon thereafter amputated the injured member at a point sufficiently below the knee to class the loss as that of a foot. This amputation was performed without the knowledge or consent of appellants, whose medical advice had been that amputation was not necessary. Defendants, however, continued to pay Addison the statutory compensation of $10 per week and $5 per week extra for some time, during which negotiations were had and a tentative agreement reached as to compensation, as defendants contend, which Addison later refused to recognize, the details of which may be omitted, and on July 10, 1918, defendants filed with the Industrial Accident board a petition to be relieved from paying further compensation beyond 2 weeks, setting up, which is undisputed, that compensation had already been paid by them under the act for 123 weeks, and 2 additional weeks' compensation tendered, with a request for a final receipt for payment on a basis of the loss of a foot, which claimant refused to accept or sign. After hearing the parties the board made an award upon the theory that for the period of 54 1-3 weeks after the accident and prior to the amputation Addison was entitled to receive compensation at the rate of $10 per week for total incapacity, and after the amputation further compensaion for 125 weeks at the same rate on the basis of the loss of a foot, making a total of 179 1-3 weeks. From this defendants appeal by certiorari, asking an interpretation of the Workmen's Compensation Act on that proposition.

To summarize the salient facts which raise the question: Addison suffered an accidental injury, under which he was paid compensation for total incapacity at the rate of $10 per week for 54 1-3 weeks. Necessarily the payments during that time were under the provisions of section 9, part 2, of the act, as he had lost no members and was totally incapacitated for work. His foot was then amputated, and payments at the rate of $10 per week were continued until he had been paid and tendered compensation for 125 weeks, the compensation specified in section 10 for loss of a foot. The Industrial Accident Board awarded compensation for total incapacity during the 54 1-3 weeks plaintiff was disabled without loss of any member, and after the operation continued compensation during 125 weeks more for loss of a foot.

For defendants it is contended that the one injury which plaintiff sustained resulted in the loss of a foot, entitling him, as specifically provided in section 10, to 125 weeks' compensation for such loss, to be computed from the date of the injury, as provided in section 3; the exact time when the foot was amputated having no material significance.

Plaintiff's counsel acquiesce in the award, being "inclinded to believe that the board was correct in its interpretation," but with a reservation directed to the proposition of total incapacity to the maximum period under section 9, also say:

"We are not certain that the Industrial Accident Board arrived at the correct decision in this matter, in awarding compensation to applicant for 54 1-3 weeks as for disability, and for 125 weeks for loss of a foot. We are quite certain that, if the board erred at all, it erred to the prejudice of appellant."

Part 2 of the act (commencing on page 2059, vol. 2, Comp. Laws 1915 deals with the subject of compensation. Section 4 of that part (section 5434, Comp. Laws 1915) provides:

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"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

This section is but incidentally pertinent, as it is undisputed that the employer furnished or caused to be furnished to the injured employee what was required in that particular for not only the first 3 weeks after the injury, but almost a year longer.

The controversy directly involves the construction of sections 9 and 10 of part 2, which are necessarily to be considered, both with reference to their relations with each other and the general purpose of the act. First dealing in the matter of compensation with the subject of total incapacity, without particularizing as to the nature of the injury, the Legislature provided:

"Sec. 9 [Sec. 5439, Comp. Laws 1915]. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half his average weekly wages, but not more then ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, exceed four thousand dollars."

Then, passing to the subject of partial incapacity, it further provided:

"Sec. 10 [5440]. While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to wit."

The section then continues with 16 short specifying subparagraphs, declaring what "shall be" the compensation, measured by weeks and average weekly wages, for loss of various named members, the fourteenth being, "For loss of a foot, fifty per centum of average weekly wages during one hundred and twenty-five weeks," while the last provision of this section, directly relating to loss of named members, differentiates the two by relegating a double loss to the provisions of the immediately preceding section, which is devoted exclusively to total incapacity—as follows:

"The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of section 9."

"Permanent disability" in the connection used can signify in its amplification no more than a conclusive presumption of total incapacity for work as a result of the injury during the maximum number of weeks for which compensation may be awarded under he provisions of section 9. "Disability" and "incapacity" are of like import as found in this act, which does not cover injuries having no tendency to impair the earning capacity of the employee. The purpose and scope of the legislation is directed and limited to providing a measure of compensation, not full, but certain, to those incapacitated for work by industrial accidents, to be paid without regard to any of the legal liability tests of the employee's or employer's negligence, assumption of risk, or negligence of a fellow servant. Such award is based on loss of earnings only,

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rated by previous average weekly wages, a percentage of which is to be paid during a fixed number of weeks, made by the act definitely determinable as the facts are found, and limited at longest to 500 weeks. Loss of members is only recognized and provided for as the same relates to impairment of earning capacity for a definite time. Even if the injury results in death of the employee, continuation of a percentage of deceased's average weekly wages during a maximum period of 300 weeks is the basis and limit of the award to his dependents.

As applied to the facts in the instant case, it is manifest that plaintiff's condition before amputation of his foot entitled him to weekly compensation from the date of his injury for continuing total incapacity under section 9. During that time he had lost no member, and section 10 had no application. Upon the amputation of his foot by a physician of his own selection, Addison's theretofore indeterminate total incapacity, only cognizable under the general provisions of section 9, took definite classification under a specific provision of the succeeding section (10), which is devoted to partial incapacity and specified compensation for loss of named members; the maximum period mentioned in said section being 300 weeks. His disability before that time entitled him to weekly compensation for total incapacity resulting from the accident, to be "computed from the date of his injury." It was so computed and paid, as required by sections 3 and 9, to the maximum amount of weekly compensation authorized by the act, until amputation took place. Not until then was the loss of his foot an element in the case. Defendants did not and could not pay him weekly compensation up to that time for the loss of a member which he had not lost. After such loss his disability from the accidental injury resulting in incapacity for work concededly continued, but from that time came squarely under the schedule of losses in section 10.

The statute does not in direct words anywhere specify that weekly compensation for loss of a foot or other member must be computed from the date of the injury. Section 3 only requires in general terms that compensation for disability caused by an industrial accident, which continues for 8 weeks or longer, shall be so computed. It was so computed by the board, payable weekly on the maximum basis of half wages through consecutive weeks until terminated by the conclusive presumption which the Legislature saw fit to apply to the disability resulting from the injury in its final form. Under section 9 the law does not concern itself with the kind or character of the injury sustained, beyond the inquiry whether it has caused total incapacity to work and earn wages. If total incapacity has resulted, whether temporary or permanent, that section covers the case until further developments. Its application may be terminated by the maximum period of payment fixed by the statute being reached, by death, full recovery, or such recovery that the injured employee is only partially incapacitated for work, or by the loss of a member. When partial incapacity or single loss of a member as provided in section 10 eventuates, the latter section applies and controls, while a double loss of specified members would remain under and be compensated according to the provisions of section 9 as before pointed out. Section 10, as the last utterance upon the subject to which it relates, controls against any inharmonious provisions of section 9. That such was the legislative intent is indicated by the express provision in section 10 excluding double loss of members from its cognizance and placing such incapacity under the provisions of section 9.

It is within the spirit of the law, and does no violence to the wording of the sections under consideration, to construe them as authorizing compensation for existing total incapacity resulting from any injury to a member while medical skill is attempting to restore and save the same, and until such time as developments have proved amputation nec-

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essary, followed by compensation for the loss of such member during the period fixed by the act after such loss becomes an actuality cognizable under the schedule in section 10. When the schedule provisions of section 10 become applicable, the actual extent and duration of incapacity resulting from the specified injury yield to the indisputable presumption expressly declared in the statute by the Legislature, which only obtains in case the member is in fact gone or lost. Packer v. Olds Motor Works, 195 Mich. 497, 162 N. W. 80.

Counsel contend that this construction is at variance with Limron v. Blair, 181 Mich. 76, 147 N. W. 546, wherein it is said that, if the injured employee—

"is in fact disabled by the loss of a foot, or otherwise, for a greater period than 125 weeks, compensation continues until disability is removed, or the maximum of compensation is paid."

That case involved total disability, due to other injuries, as well as the loss of a foot. In connection with the language stressed by counsel it is also said:

"If one of the results of accident is the loss of a foot, the period of total disability is 125 weeks, although it may be in fact only 6 weeks. The period is not extended because, as a result of the accident, the employee was in fact totally disabled for a period of 125 weeks, or for any shorter period. * * * The statute speaks in terms of disability. * * * It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employee is disabled. When the period of disability ends, compensation ceases."

Manifestly this means the period of disability as fixed and defined by statute, not necessarily the full period of actual disability in fact, which may be and sometimes is for life. The disability in terms of which the statute speaks is disability or incapacity for work as recognized, defined, and limited by the various provisions of the act. While the statute does not provide specific indemnity for loss of a member in addition to compensation for otherwise caused disability, when an existing disability is or becomes defined by and limited to the loss of a member, its thereafter duration and degree, as specified in section 10, are conclusively determined and fixed as total disability, or incapacity for work, during a period of 125 weeks, although it may be in fact only 6 weeks, or for life; but, if the injured employee is also in fact "otherwise" disabled, compensation could continue until such disability is in fact removed, or in contemplation of law terminated by reaching the maximum time or amount authorized. To constitute the law in this class of cases as limiting compensation to 125 weeks for the loss of a foot would be to retroactively cover under section 10 a period of total disability during which under existing facts the section had no application, and to deny relief under section 9, which, until the member was actually lost, did directly and exclusively apply; while to hold under section 9 that weekly compensation could be awarded for total disability from the date of the injury until the maximum limit of 500 weeks' time or $4,000 compensation was reached, if total disability in fact continued, would be to entirely ignore section 10, which concededly was applicable after the foot was amputated, and thereafter defined by statutory presumption the resulting period of total disability and weekly compensation therefor.

The award made by the board in this case does not impose concurrent payments for separate injuries or disconnected from earning power for any specific injury causing physical impairment. It provides compensation payable weekly for a fixed time during which the employee is actually or presumptively disabled, not any portion of it for loss of a member as such, but, so far as that loss is involved, based on a presumed disability or total impairment of earning capacity for a stated number

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of weeks after such loss.

We conclude that the construction of the act by the Industrial Accident Board as applied to the facts in this case is permissible within the wording, spirit, and inferable intent of the law considered in all its provisions.

The award is therefore affirmed.

The late Justice Ostrander took no part in this decision.

SUPREME COURT OF NEBRASKA.

ANDERSON

v.

KIENE ET AL. (No. 21062.).*

MASTER AND SERVANT—ON TRIAL BY COURT JUDGMENT ON CONFLICTING EVIDENCE SUSTAINED UNLESS CLEARLY WRONG.

"Under the Employers' Liability Act (Laws 1913, c. 198, as amended by Laws 1917, c. 85), where the case is heard in court before a judge of the district court upon conflicting evidence, and where there is competent evidence sufficient to sustain the finding, the judgment rendered by the district court will not be set aside on appeal, unless it is clearly wrong." Miller v. Morris & Co., 101 Neb. 169, 162 N. W. 417.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Appeal from District Court, Douglas County; Estelle, Judge.

Application in the compensation commissioner's office, by Samuel G. H. Anderson, as father and next friend of William D. Anderson, to recover for personal injury to the son while in the employ of George Kiene and others. Application denied, finding of compensation commissioner affirmed on plaintiff's appeal to the district court, with judgment therein dismissing the action, and plaintiff appeals. Affirmed.

Switzler, Goss & Switzler, of Omaha, for appellant.
J. C. Kinsler, of Omaha, for appellees.

DEAN, J. Plaintiff filed an application in the compensation commissioner's office pursuant to the Employers' Liability Act, namely, chapter 35, art. 8, Rev. St 1913, as amended by Laws 1917, c. 85, to recover for personal injuries sustained while in defendant's employ. The application was denied, and upon appeal to the district court for Douglas county the finding of the compensation commissioner was affirmed, and the action dismissed. Plaintiff appealed.

The only question involved is whether the judgment is sustained by the evidence. The injury occurred on July 24, 1918, that being the second day of plaintiff's employment. He was then 18 years of age. His wage was at the rate of 45 cents an hour for an 8-hour day. Beginning immediately after the accident, and for a period of 22 weeks, defend-

*Decision rendered, Oct. 4, 1919. 174 N. W. Rep. 301. Syllabus by the Court.

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ant paid plaintiff, as compensation, $264, being $12 a week, and also all hospital and medical services, which amounted to $198.50 additional.

At the time of the injury plaintiff was working on the upper part of a one-story brick building. His work consisted in taking the wheelbarrows, loaded with bricks and said to weigh about 30 pounds, from a hoist or elevator, and wheeling them to the different parts of the building as needed by the workmen. Plaintiff testified that the scaffolding gave way just as he was about to remove a wheelbarrow, and that he fell with the elevator about 30 feet. Upon examination it was discovered that he received an injury to the "third lumbar vertebra." Plaintiff contends the injury is permanent.

To determine this point expert testimony was introduced by the parties. On the part of plaintiff a physician testified that his examination showed the spine to be normally flexible. He further testified.

"Q. And this spine, then, is normally flexible now, or just as flexible as any spine would be that had never been injured? A. It seems to be."

A doctor called by defendant on cross-examination testified:

"Q. Did you find any evidence at the present time of any injury to his back? A. No. Q. And is it not a fact that you find him to be in perfect physical condition at the present time? A. As far I could make out by my examination. * * * Q. So that, if the X-ray shows some injury at some time, it is true that he has recovered from that injury now? A. As far as I can determine by an examination."

He also testified that he did not find any abnormal conditions. When the case was tried, plaintiff went through a course of bending exercises in the presence of the trial judge, so that the court seems to have been well advised. At the time of the trial plaintiff was employed by an outfitting company at Omaha as a bill collector, and his work required him to travel on the street cars from place to place about the city. For this work he was receiving $17 a week for a working day of 4 hours. It may be added that when plaintiff fell he sustained a fractured wrist, but in the oral argument and in the briefs his counsel says that, the wrist having become normal, no claim was made for additional compensation on that account

In view of the finding of the compensation commissioner and the judgment of dismissal by the district court, we do not think the case should be reversed. There is some conflict in the testimony as to the condition at the time of the trial, but there is sufficient to support the judgment. Miller v. Morris & Co., 101 Neb. 169, 162 N. W. 417.

Finding no reversible error, the judgment is affirmed.

Rose, J., not sitting.

SUPREME COURT OF NEBRASKA.

MUNCASTER

v.

GRAHAM ICE CREAM CO. ET AL. (No. 20421.)*

MASTER AND SERVANT—SERVANT'S ACTION AGAINST THIRD PARTY—ATTACHMENT.

Under the provisions of section 3659, Rev. St. 1913, an employee has the right to sue a third party for damages, even though his employer

Decision rendered, March 27, 1919. 172 N. W. Rep. 52. Syllabus by the Court.

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has settled with the employee in accordance with the provisions of the Workmen's Compensation Act, if he makes his employer a party to the action.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from District Court, Douglas County; Redick, Judge.

Action by Joshua Muncaster against the Graham Ice Cream Company and the Baker Ice Machine Company. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Gray & Brumbaugh, of Omaha, for appellant.

J. E. von Dorn, of Omaha, for appellees.

ALDRICH, J. Plaintiff commenced an action against defendant to recover damages for personal injuries received growing out of the alleged negligence of the Graham Ice Cream Company. Plaintiff was an employee of the Baker Ice Machine Company, who had contracted to install some machinery for the Graham Ice Cream Company. The ice machine company settled with the plaintiff under the provisions of the Workmen's Compensation Act (Rev. St. 1913, §§ 3642-3696), and now refuses to proceed further and to commence an action for damages against the Graham Ice Cream Company, on behalf of the plaintiff. So plaintiff, as is his right under the statute, commenced an action against both defendants to recover damages.

Now the issue is: Can the plaintiff maintain this action under the provisions of section 3659, Rev. St. 1913? It is claimed that plaintiff suffered his personal injuries and damages growing out of the carelessness and negligence of the Graham Ice Cream Company, which is a third party under the provisions of the Workmen's Compensation Act. In other words, after having received compensation under this act, does that bar plaintiff from commencing an independent action in damages against the Graham Ice Cream Company? Under the provisions of section 3569, the Legislature intended beyond question to give to the injured employee a right of action where the injury complained of grew out of carelessness or negligence of a third party, and we hold that plaintiff has the right to maintain this cause of action under section 3659, and is bound under its provisions to strictly follow the procedure provided for, and in case of recovery of damages the funds must be distributed in the matter of expense, etc., under the provisions of this act. Evidently the intent of the Legislature was not to limit an employee to the recovery only of the Workmen's Compensation Act; but when, as a matter of justice, the employee was entitled to recover a greater compensation than is provided for in the act, then he had the right to proceed under the provisions of section 3659, and to recover as much as a jury would warrant for his damages and injuries, and, after so recovering, to deduct therefrom the necessary expenses which his employer had been to in paying out under the provisions of the act. In other words, the plain provisions of this act must be carefully and accurately followed in all of its provisions. It is valid, and the plaintiff is entitled to whatever provisions of compensation there may be growing out of this act. The Baker Ice Machine Company is simply subrogated to the position of the plaintiff herein, and in case the Baker Ice Machine Company, after having settled with the employee under the Workmen's Compensation Act, refuses to go ahead any further, and washes its hands of the whole proceeding, then plaintiff should not be prevented from proceeding under the provisions of this act, as he has done in this case.

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This case, therefore, must be reversed and remanded for further proceedings.

Reversed and remanded.

Cornish, J., not sitting.

LETTO, J. (concurring). I concur for a different reason. My view is that plaintiff's right of action, if any, against the Graham Ice Cream Company, a third person with whom he had no contractual relations, is not given by the Workmen's Compensation Act, and that section 3659, Rev. St. 1913, allowing the subrogation of the employer, is merely to provide for the reimbursement of the employer for payments made by him to the injured person, under the provisions of that act.

If the employer, after paying the amount of the statutory compensation, refuses or neglects to bring his action against the negligent third party, this does not deprive the injured person of his right of action against the wrongdoer; but he should, as in this action, make his employer and the alleged wrongdoer both parties to the action. In such case he is entitled to recover his damages from the third party, less the compensation paid, as provided in section 3659, and the employer, if he asks for the relief, will be entitled to a judgment equal to the amount of the compensation he has paid. Smale v. Wrought Washer Mfg. Co., 160 Wis. 331, 151 N. W. 803; Otis Elevator Co. v. Miller & Paine, 240 Fed. 376, 153 C. C. A. 302.

This section should be construed, not to defeat the injured person, but to do justice between him and his employer.

Sedgwick, J., agrees with this concurrence.

SUPREME COURT OF OKLAHOMA.

RAULERSON

v.

STATE INDUSTRIAL COMMISSION OF OKLAHOMA ET AL.

(No. 10496.)*

MASTER AND SERVANT—INDUSTRIAL COMMISSION'S DECISION ON FACTS NOT REVIEWABLE.

In a suit instituted in this court to review an award of the state Industrial Commission, the suit must be to review an error of law, and not an error of fact. Their decision as to all matters of fact is final.

(For other cases, see Master and Servant, Dec. Dig. § 417[7])

Original suit in the Supreme Court by John Raulerson appealing from an award of the State Industrial Commission of Oklahoma on the theory that it erred in not allowing adequate compensation for personal injury against the Tulsa Boiler & Sheet Iron Works and the Kansas Employees Interinsurance Exchange. Dismissed.

* Decision rendered, Sept. 16, 1919. 183 Pac. Rep. 880. Syllabus by the Court.

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Wilson, Tomerlin & Buckholtz, of Oklahoma City, for plaintiff.

S. P. Freeling, Atty. Gen., R. E. Wood, Asst. Atty. Gen., and Twyford & Smith, of Oklahoma City, for respondents.

HIGGINS, J. Suit was instituted in this court, by plaintiff, wherein he complains of an award of the State Industrial Commission, for the reason that the award is inadequate to compensate him for the injuries received by him.

He states that he was employed by the Tulsa Boiler & Sheet Iron Works, and while in its employ sustained an injury to his foot; that after his injury a settlement was had with him, but, owing to his unmaturity of age, he being a minor, the settlement was inadequate; that the settlement was confirmed by the commission; that thereafter he discovered that he was more or less permanently injured, made application to the commission to have the award set aside, whereupon, by order of the commission, the case was reopened, and upon further hearing the commission made an order, denying the application to set aside the award previously made, whereupon this suit was commenced.

The defendant contends that the award by the commission, in passing upon matters of fact is final and not subject to a suit of this kind. In section 10, art. 2, of chapter 246, Session Laws 1915, in defining the powers of the State Industrial Commission, it is provided:

"The decision of the commission shall be final as to all questions of fact, and except as provided in section 13 of this article, as to questions of law."

In Board of Commissioners v. Barr, 173 Pac. 206, it is held:

"Under the provisions of section 10, art. 2, of the Workmen's Compensation Act * * the decision of the State Industrial Commission is final as to all questions of fact."

This suit is instituted upon the theory that the commission has erred in not allowing adequate compensation; that the wounds inflicted justify a greater compensation. This is a question of fact, and the law as laid down in Board of Commissioners v. Barr, supra, is controlling.

Therefore this suit is hereby dismissed.

SUPREME COURT OF OKLAHOMA.

LUSK ET AL.

v.

BANDY. (No. 9127.)*

1. MASTER AND SERVANT—CASE BY PLEADING AND EVIDENCE WITHIN FEDERAL EMPLOYERS' LIABILITY ACT CONTROLLED THEREBY.

A case which by allegation and proof is brought within Employers' Liability Act April 22, 1908, c. 149, 35 State. 65 (U. S. Comp. St. §§ 8657-8665), is controlled by that act, although its provisions may not have been referred to in express terms in the pleadings.

(For other cases, see Master and Servant, Dec. Dig. § 256[1].)

* Decision rendered, Apr. 29, 1919. Rehearing denied, Oct. 7, 1919. 184 Pac. Rep. 144. Syllabus by the Court.

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Error from District Court, Pontotoc County; J. W. Bolen, Judge.

Action by Francis Bandy, nee Francis Jones, administratrix of the estate of Clay Jones, deceased, against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Verdict and judgment for plaintiff, motion for new trial overruled, and defendants bring error. Affirmed.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt, of Oklahoma City, and Jones & Foster, of Muskogee, for plaintiffs in error.

Robt. Wimbush and W. C. Duncan, both of Ada, for defendant in error.

JOHNSON, J. This action was commenced on the 23d day of December, 1915, in the district court of Pontotoc County, by plaintiff, under the name of Francis Jones, as administratrix of the estate of Clay Jones, deceased, to recover of the defendants damages for the alleged wrongful death of the said Clay Jones. The action was instituted under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]). The petition, exclusive of caption and formal allegations, is as follows:

"That the defendants are the duly appointed, qualified, and acting receivers of the St. Louis & San Francisco Railroad Company, a corporation, and that said receivership is pending in the District Court of the United States for the Eastern Division of the Eastern District Court of the State of Missouri, and as such receivers the defendants are in charge of the property of said railroad company, said property consisting, among other things, of railroads, cars, stations, shops, roundhouses, turntables, engines, etc. That said receivers are operating said railroad, a line of which passes through the state of Oklahoma in the county of Pontotoc, and a line of which extends from Denison in the state of Texas, to the city of Sapulpa, in the state of Oklahoma, and from the city of Sapulpa in the state of Oklahoma, to the city of Monett in the state of Missouri, and that there are agents of the defendants in Pontotoc County upon which service of summons may be had.

"Second. Plaintiff further alleges that heretofore, to wit, on the 3d day of November. 1915, the plaintiff's decedent. Clay Jones, was in the employ of the defendant's receivers in the capacity of a workman and boiler washer in the town of Francis, state of Oklahoma; that on said day and date, and for some time prior thereto, the said decedent was engaged as a boiler washer in washing boilers of engines belonging to the defendants receivers, which said engines were used by the defendants in both interstate and intrastate commerce and traffic from the town of Francis, state of Oklahoma, to the town of Denison, state of Texas, and points within the state of Missouri along defendants' line of railroad, said points being to this plaintiff unknown.

"Third. Plaintiff further alleges that while said decedent was so employed as hereinbefore set out in paragraph 2 of this petition, and for a long time prior thereto, the defendants receivers owned and operated in their yards at Francis, Okla., a turntable; that said turntable was used and operated by the defendants for the purpose of turning defendants' engines, which said engines were used by the defendants receivers in transporting freight and passenger cars from the town of Deinson, to the town of Francis, and from the town of Francis to the town of Denison, and to ther points both north and south of the town of Francis, which points are to this plaintiff unknown.

"Fourth. Plaintiff further alleges that it was the duty of her decedent. Clay Jones, to work ——— hours a day for the defendants, and that his day's work terminated at 7 o'clock in the evening, and under the rules and regulations prescribed by the defendants, their agents, servants, and

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employees, who had supervision of said decedent, it was the duty of said decedent to report to one of the defendants' agents, servants, and employees and to 'register off' for the day's work; that said decedent had been accustomed to making such report and 'register off' on each and every day that he worked for a long time prior to the 3d day of November, 1915.

"Fifth. Plaintiff further alleges that on the said 3d day of November, 1915, at about the hour of 7 o'clock, said decedent had, during all said 3d day of November, 1915, been at work in the roundhouse or engine house washing boilers of engines belonging to the defendants; said engines having on said 3d day of November, 1915, and a few days prior thereto, been used by defendants in transporting its trains and cars from Francis, Okla., to Denison, Tex., and from Denison, Tex., to Francis, Okla., and it was contemplated by defendants, their agents, servants, and employees to again use said engines for the purpose of transporting and pulling its trains from Francis, Okla., to Denison, Tex., and ffom Denison, Tex., to Francis, Okla.; and that said night was very dark, and that plaintiff's decedent, upon leaving said enginehouse, fell into the pit in which said turntable was located, striking his head against the cement floor or bottom of said pit, fracturing his skull and breaking his neck, from which wounds said decedent then and there instantly died. Plaintiff further alleges that a short time prior to 7 o'clock, the time prior to which decedent was required to 'register off' for the day, one of the agents, servants, and employees of the defendants receivers, notified said decedent that he would be required to return after supper and do extra work in his capacity as a boiler washer for said defendants.

"Sixth. Plaintiff alleges that said turntable was situated north and east of the engine house or place where said decedent was required to work, and about 20 feet therefrom, and that it was necessary for said decedent to pass around and near said turntable in performing his duties and especially in going to the place where he was required by defendants to 'register off' from the day's work.

"Seventh. That the defendants receivers, their agents, servants, and employees, well knew that the said turntable and the pit in which the same was situated was a dangerous place, and that all the defendants' agents, servants, and employees engaged in work similar to the work that said decedent was engaged in necessarily had to pass about, around, and near the said turntable, all of which was known to the defendants receivers, their agents and employees, and that said defendants receivers, their agents, servants, and employees, were guilty of gross neglect towards its workmen, and especially toward said decedent, in failing to keep and maintain any lights of any character in or about said turntable, and in or about the pit in which said turntable was situated, and that said neglect was the immediate and proximate cause of said decedent falling into said pit, and was the immediate and proximate cause of his death.

"Eighth. Plaintiff further alleges that said decedent was comparatively a young man, being at the time of his death about 37 years of age and capable of earning the sum of $2.50 per day by his labors; that he was attentive to his work and reasonably expected to become more efficient in his services and to earn greater sums of money per day; and that said decedent was a strong, healthy man, and with a reasonable expectancy of living to an old age, to wit, the age of 74 years.

"Ninth. Plaintiff further alleges that this plaintiff, administratrix, is the surviving wife of said decedent, and Myrtle, about the age of 12 years, Alger, about the age of 9 years, and Scott, about the age of 5 years, and Opal, of about the age of 15 months, are the surviving children of this plaintiff and said decedent, and that the children and this

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plaintiff are the sole and only surviving heirs at law of said decedent, and that the said decedent contributed his earnings to the support and maintenance of this plaintiff and said children, and would have continued to have contributed to their support for and during the balance of his life.

"Tenth. Plaintiff alleges that by reason of the acts and injuries and negligence of said defendants receivers, their agents, servants, and employes, this plaintiff and her said children have been damaged in the actual sum of $25,000.

"Wherefore, premises considered, plaintiff prays that said defendants and each of them be cited to answer this petition, and, on final hearing hereof, that she as administratrix have judgment for the sum of $25,000 for the use of herself individually and her said children, Myrtle, Alger, Scott, and Opal, and that said judgment be declared a lien upon the property and funds of the St. Louis & San Francisco Railroad Company, a corporation, which may be in the hands of the defendants receivers, and that the same be established as a claim against said property and money, and for such other relief to which she may show herself entitled, whether in law or equity."

Thereafter, to wit, on October 2, 1916, the defendants filed their answer to said petition, which answer presented the following defenses, to wit:

First. General denial.

Second. Special denial of negligence, and allegation that the death of said intestate was caused solely and entirely by his own negligence and want of care.

Third. Contributory negligence.

Fourth and Fifth. Assumption of risk.

On November 10, 1916, plaintiff filed her reply, consisting of general denial of new matter alleged in the answer.

The cause having been submitted to the jury, they returned into court the following verdict, to wit:

"We the jury drawn, impanneled and sworn in the above-entitled cause, do upon our oaths find for the plaintiff and assess the damages:

For Francis Bandy, formerly Jones.....$ ...	200 00
For Myrtle Jones the sum of.....	1,000 00
For Alger Jones the sum of.....	1,200 00
For Scott Jones the sum of.....	1,400 00
For Opal Jones the sum of.....	1,800 00
	$5,600 00

"W. C. Lee, Foreman."

Thereafter, on the 1st day of December, 1916, and within three days after the rendition of this verdict, the defendants filed in said cause their motion for new trial, which said motion was by the court overruled, and defendants excepted. Thereupon case-made was duly prepared, served, and settled as required by law, and the cause was brought to this court for review by petition in error. The errors relied upon are as follows:

First. The court erred in overruling defendants' demurrer to plaintiff's evidence.

Second. The court erred in overruling defendant's motion for peremptory instructions.

Third. The court erred in refusing to give to the jury the several written instructions requested by defendants and in refusing to give each of said instructions separately and severally.

Fourth. The court erred in giving to the jury the several instructions to which defendants excepted at the time and in giving each of said instructions separately and severally.

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Fifth. The court erred in receiving the verdict of the jury apportioning the damages among the widow and minor children.

Sixth. The court erred in rendering judgment on the verdict of the jury and in rendering separate judgments in favor of the widow and minor children.

Seventh. The court erred in overruling the defendants' motion for a new trial.

[6] The testimony in this case shows, in substance, that the railway company at the time of the accident, and for a number of years prior thereto, maintained a division at the town of Francis, Okla., where the accident occurred, at which it maintained and used, as facilities and instrumentalities in operatng its trains, a roundhouse, turntable, and numerous tracks for the handling of its locomotives, and that engines coming from the north and south, respectively, were disconnected from the trains and stored in the said roundhouse and tracks and then others sent from said roundhouse and tracks to be used in place of the one stored, and that said line of railway extended from the town of Francis, Okla., south to Denison, Tex., and points further on in the state of Texas, and from Francis, Okla., north to Monett, in the state of Missouri, and other destinations north and beyond Monett, and that the deceased had been an empolyee of the said railway company at Francis, Okla., for about two years prior to the accident which resulted in his death, in the capacity of boiler washer. For about one year after he began working for the company. he was on the night shift, and that about one year prior to the accident he had been upon the day shift, and that while upon the day shift he worked eleven hours, beginning at 6 a. m. and quitting at 7 p. m., and that the company had installed in a room adjoining the roundhouse a clock where employees were required to register on coming on duty and going off duty; that the deceased on the 2d day of November, 1915, the date of the accident, registered as follows; Morning, in, 6:41, out, 12:02, afternoon, in. 12:41, out, 7:07. His time card for that day also shows, hours, 11, amount, $2.00, and bears the indorsement: "Examined and distribution is correct. J. H. Huckins, Foreman."

J. H. Huckins, foreman of the roundhouse, testified:

"Last time I saw him on the 2d, night of the 2d, when found him next morning, morning of the 3d, and he and I put a switch engine out together about 5.30 p. m. I handled the engine and he held the table for me, and we went to the coal shed and got some coal, and back to the water tank, and he taken water on the engine, and he throwed the switch for me, and I back out on what was called the out-bound track after this engine was set out for night service. I never saw him any more after that until next morning. I told him after we got through with this switch engine that I wanted him to come back and wash the pile driver that was coming in off the road for a washout, but we would call him when the pile driver got in, that I did not know what time they would get in, might be 12 o'clock and might be 1 o'clock. Did not have him called for that work, but told Mr. Johnson, the night foreman, about what I told the deceased about 8:30 or 9 o'clock, and told him to have deceased called."

E. C. Johnson, night foreman, testified.

That the deceased was supposed to work in the roundhouse and by the side thereof. Once in a while they washed boilers by the side of the roundhouse over by the old rip track. Saw deceased about 7 p. m. in the clock room; seemed to be checking out. The foreman told me about 7:15 or 7:20 the deceased would be back that night to wash the pile driver boiler; suppose the deceased was then out around the roundhouse. He told me he was coming back to wash the pile driver boiler. I said, "All right." The last time I saw him was about 9 o'clock. About that

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time he went out the west door of the roundhouse. The pile driver came in something like 9 o'clock. The deceased was there then. Did not give him any instructions about washing the pile driver and never did have him called for it. I did not have him wash it, because I thought he was drinking. That he (Johnson) and his brother washed the pile driver.

This was contradicted by Marvin Johnson, who said:

He and Bob Scoggins washed it about 11 or 12 o'clock; that they used torches for light, which they got in the storehouse where they kept them for use by employees; that there were no lights on the turntable that night; the pile driver was on the old rip track; used a hose that was connected to fountain No. 1 inside the roundhouse through a window on east side about 10 steps to where the pile driver stood, or hardly so far. It was about 20 steps from an oil lamp on a post, which light sometimes burned and sometimes did not, but could not get light from it if it had been burning. We used torches for light. Was dark around the roundhouse before I went to work. The storeroom, with the clock room in controversy, was at the southeast corner of the roundhouse.

The evidence places the deceased going out of the west door of the roundhouse at about 9 o'clock at night after the pile driver was in and set on the old rip track east of the roundhouse about 10 steps, or maybe less, and about 20 steps southeast of the turntable and pit, which was not lighted, and it was dark in and around there. The turntable was 20 feet north of the roundhouse. There were four tracks from the turntable into the roundhouse, six north and west thereof, one east. If the deceased had started from the point where last seen alive to his house, north and east, his route lay northwest, over the tracks from the turntable, and the distance from where his dead body was found in the pit would vary from, say, 50 to 100 feet. If he were going from that point to clock and storeroom to begin his work, his route would be around between the roundhouse and turntable over the tracks to the west side of the roundhouse. The jury was warranted from the evidence to draw either inference.

The testimony showed that the railway company's turntable was situated about 20 feet east from the east side of its roundhouse; that there were four tracks leading from the turntable into the roundhouse, one track leading from the turntable to the east of the roundhouse, six tracks leading from the turntable north and west therefrom, and some four tracks leading from the east on to the turntable; that the turntable revolved in a pit varying in depth from about 5 feet at the edge thereof, to 6½ feet at the center thereof, and the same was built of concrete and it had a solid concrete bottom; that the deceased was seen alive by the witnesses at about 9 o'clock p. m. on November 2d, and was at the time in and around the roundhouse, and especially the clock room thereof, which room was at the southwest corner of the roundhouse, which had a door that opened to the south; that there were two doors entering the roundhouse, one of which was near the northwest corner and the other near the southwest corner; that the rip track, upon which the pile driver engine was set for the purpose of having its boiler washed, was about 20 feet south of the roundhouse, and where the engine set at the time was a little to the southeast of the doors of the clock room and the roundhouse; that the deceased lived some distance northeast from the roundhouse; and that his route home was from the northwest door of the roundhouse in a northeasterly direction, and in going to and from his home to the roundhouse would not be required to pass over but one or two of the tracks of the railway company, and would intersect a public traveled road about 150 feet north of the turntable, and at which point his hat was found at about 6:30 of the morning of November 3d, and his body was found in the pit near the north edge thereof and about

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150 feet from where his hat was found. He was dead, his neck having been broken and his skull fractured, and there was a pool of blood near his head.

This testimony was very much in conflict as to whether or not the premises in and around the company's turntable and tracks leading thereto were kept lighted in the nighttime, and especially on the night of the 2d of November, some of the witnesses testifying that on that occasion there were no lights to the turntable, and had not been for several months prior thereto; that sometimes an oil lamp was kept burning and sometimes two, neither of which were sufficient to light the turntable itself and the tracks surrounding; that frequently neither light was kept burning; that numerous trains arrived in the nighttime from the north and south, engines were changed, and boilers washed. While other witnesses testified that the premises were kept lightd at all times in the night, and were so lighted in the night of November 2d.

The witness Homer Kellogg testified that the deceased worked on several engines, washing the boilers on the date of his death, and that about 6 p. m. of said day he assisted the deceased in handling a passenger engine; the deceased changing the water, and he (Kellogg) building the fire therein.

The witness Marvin Johnson testified that he and one Bob Scoggins washed the boiler of the pile driver on the night of November 2d, at about 11 or 12 o'clock: that the deceased did not assist them; that there were no lights at the turntable or where they washed the boiler, for they used torches to furnish them light; that he worked on the night shift; that when they washed the boiler of the pile driver it was setting on the old rip track on the east side of the roundhouse, about 10 steps therefrom; that it was the custom of the boys working on the night shift to knock around over the roundhouse grounds and turntable; and that no objections were ever made by the foreman or the man in charge. The same condition had existed for three of four months prior to the accident.

Barney Bernard, an employee of the railway company, testified that the pile driver in question was used in driving piling out on the Frisco road, of the branch line running from Denison, Tex., to Sapulpa, Okla.; that the tracks were used for the transportation of freight and passengers over the country from points both within and without the state. He testified that the engine No. 1247 was handled by the deceased on the day preceding his death; that it came from the south going north, and pulled 21 loads and a caboose; and that the loads came from Hugo, and some from Sherman, and they were going to St. Louis, and they started from Sherman on that day; also, he handled engine No. 3704, which was a switch engine, and it hauled all of aforesaid cars brought in by engine No. 1247; that engine No. 628 was the engine that was set in for that night, and took out the pile driver the next morning.

J. T. Bryant, an employee of the railway company, testified that he was an engine wiper; that he knew the deceased; and that the deceased washed the boiler of engine No. 3704 that evening.

The defendants' third and fourth assignments of error, are that the court erred in refusing to give certain requested instructions and in giving instructions to which the defendants objected and excepted at the time, which assignments will be here considered together.

We find that the defendants' requested instructions which were refused by the court and excepted to by the defendants, 1 to 8, inclusive, in effect requested that the court charge the burden of proof upon the plaintiff to establish all material allegations in her petition, including the allegation that both the railway company and the deceased were engaged in interstate commerce at the time of the accident complained of, by a preponderance of the evidence, and while said requested instructions substantially, for the most part, correctly stated the law, and were called

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for by the pleadings and evidence in the case, yet we find that the court covered the points by his instructions to the jury, and hence, under the decisions of this court, no reversible error was committed in refusing to give the requested instructions in the form asked by the defendants.

[1] From an examination of the record we think that, by both the allegations and proof in this case, it is clear that the same is brought within the provisions of the act as hereinafter quoted, and is controlled by that act, although its provisions may not have been referred to in express terms in the pleadings.

[2] There was testimony reasonably tending to show that the railway company and the deceased, at the time of the accident complained of, were engaged in interstate commerce. This being true, it therefore follows that the trial court did not err in overruling the defendants' demurrer to plaintiff's evidence, and defendants' request for peremptory instructions. St. Louis & S. F. Ry. Co. v. Snowden, 48 Okla. 115, 149 Pac. 1083; North Car, Ry. Co. v. James A. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Choctaw, O. N. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; Hayes v. Mich. C. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

The plaintiff alleged in her petition that the defendants owned and operated in their yards at Francis, Okla., a turntable for their use, and operated by the defendants for the purpose of turning its engines, which engines were used by the defendants in transporting freight and passenger cars from the town of Dension, Tex., to the town of Francis, Okla., and from the town of Francis, Okla., to the town of Denision, Tex., and other points both north and south of the town of Francis, Okla., which points were to the plaintiff unknown.

The acts of negligence of the defendants complained of by the plaintiff were the defendants' failure to keep and maintain any lights of any character in or about said turntable, and in or about the pit in which said turntable was situated, and that said negligence was the immediate and proximate cause of the deceased falling into said pit, and was the immediate and proximate cause of his death.

The Act of Congress of April 22, 1908, provided:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, * * * dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages

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for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The defendants complain because the court refused requested instructions Nos. 9 to 16, inclusive. Nos. 9 and 10 go to the question of assumed risk and in substance and effect advise the jury that this action was brought under the federal Employers' Liability Act, and that under the act the assumption of risk by the employee was a complete defense, and that if the deceased was familiar with the defendants' premises, and went upon the same in the dark, and in consequence of such darkness fell into such pit and was killed, then he would be held as a matter of law to have assumed the risk, and that the plaintiff would not be entitled to recover damages for his death, leaving out of the situation entirely the question of the defendants' negligence and the purpose for which the deceased went upon the premises at the time of the accident.

No. 11 instructed the jury that if the defendants maintained a roundhouse, engine pits, and turntables, and that the same were necessary appliances to the conduct of their business, and was constructed and maintained in accordance with the standard ordinarily maintained by the railroads in the country, such act would not constitute negligence on the part of the defendants. We find that the question there presented was substantially submitted to the court in paragraphs 5 and 6 in the general charge to the jury, and that the court's failure to give requested instruction No. 11, as requested by the defendants, was not error.

Requested instruction No. 12 informed the jury that if the jury believed from the evidence that, during the time the deceased was employed by the defendants, no material change had been made in the methods of maintaining such turntable pit, and in lighting the premises adjacent thereto, the deceased would be held as a matter of law to have assumed the risk and the verdict of the jury should be for the defendants. This was the same proposition involved in requested instructions 9 and 10 and was likewise correctly stated in the court's general charge to the jury, and that the court committed no error in refusing the instruction asked for the reasons heretofore stated.

Requested instruction No. 13 was in effect the same as No. 12, and the court committed no error in refusing the same for reasons heretofore stated.

Requested instruction No. 14 instructed the jury that if it found from the evidence that the deceased left the defendants' roundhouse by the west door thereof with the intention of going to his home, and that in order to reach his home he would have to proceed along a public street or highway, passing said roundhouse in the direction of his home, and if the jury further believed from the evidence that the turntable pit into which he fell was not situated so near said highway as to constitute substantially a part thereof, defendants would in that case owe deceased no duty with reference to the maintenance or the lighting of said pit.

The questions there, as stated, would have been highly confusing to the jury because the same was not applied to the facts in evidence and because the route of travel defined would neither have proceeded along a public street or highway nor woud it pass the roundhouse, as the evidence showed that the turntabe pit was situated at a point some 50 feet at a right angle from the direct line described in the instruction, and such instruction entirely ignored the question as to why the deceased was upon the premises at the time of the accident, whether he was there properly in the discharge of his duties to the defendants, or as a naked trespasser, and hence there was no error committed in refusing such instruction.

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Defendants' requested instructions Nos. 15 and 16 cover the question as to the reason why the deceased was upon the premises at the time of the accident complained of, whether he had reported there in the discharge of his duties, or as to whether his services had been completed for the day, and whether he had completed his day's work and was upon the premises for purposes other than in the discharge of his duties, and while there received his injuries.

[8] These questions, we think, were properly submitted to the jury by the court in its general charge, and that there was no error in refusing the requested instructions Nos. 15 and 16.

This court has frequently held that, even though the requested instructions state the questions of law correctly, there is no error in refusing the same when the court properly submits the questions in his general charge to the jury, and, when taken as a whole, fairly submit to the jury all the law applicable to the case. Citizens' Bank of Wakita v. Garnett et al., 21 Okla. 220, 95 Pac. 755; Finch et al. v. Brown, 27 Okla. 217, 111 Pac. 391; Higgins v. Street, 19 Okla. 45, 92 Pac. 153; Coalgate v. Hurst, 25 Okla. 588, 107 Pac. 657.

We think that the turntable, as the same was shown from the evidence to have been constructed and maintained the railway company, was one of the instrumentalities used by the railway company in the business of interstate commerce, and was included in the provisions of the act of Congress of April 22, 1908, in which it is provided that every common carrier by railroad, while engaged in commerce between the states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives for the benefit of the surviving widow and children of such employee for such injury or death resulting wholly or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, and other equipment, and the negligence charged by the plaintiff as a violation of the provisions above quoted is that it failed to keep and maintain any lights of any character in or about the turntable or in or about the pit in which said turntable was situated, and that such negligence was the immediate and proximate cause of the injury complained of, charging, in effect, a violation of the duty imposed upon the defendants by the terms of the act referred to, which act of violation was charged to be the proximate cause of the death of the plaintiff's decedent. So under section 3 of the act of Congress:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

And section 4 provides:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

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[3] The law applicable to the defense of assumption of risk under the federal Employers' Liability Act is that of the common law as it existed prior to the passage of said act, except where the common carrier has violated some section of the statute enacted for the safety of employees.

[4, 5] On the issue of assumption of risk by a servant who has sustained injuries, where the evidence is harmonious and consistent and the circumstances are such that all reasonable men must reach the same conclusion, the question whether plaintiff assumed the risk is one of law for the determination of the court; but where the facts are controverted, or are such that different inference may be drawn therefrom, the question as to the assumption of risk should be submitted to the jury under proper instructions from the court. 26 Cyc. 1479; 18 R. C. L. § 166, p. 676.

Upon these issues the court instructed the jury as follows:

"(5) If you find by a preponderance of the evidence that the deceased was engaged in interstate commerce and that he was on the yards of the defendants preparatory to comemncing actual work, and that the defendants kept and maintained a pit in said yards, and by for any reason in the discharge of his said duties, to go in, around or near said pit or excavation, if you find such pit or excavation was kept, and that the defendants negligently failed to keep said pit lighted, and the deceased fell into said pit and lost his life, and that the negligence of the defendants in failing to maintain lights to light said pit was the proximate cause of the injury to the deceased, then your verdict will be for the plaintiff, unless you find for the defendants under other instructions herein given."

(Defendants except. Exceptions allowed.)

"(6) You are further instructed that if you find that from the evidence in this case that the pit alleged was open, and that the location of the same was known to the deceased, and that said pit was an instrumentality of his employment, then you are instructed that the deceased assumed the risk of the danger connected with said open pit.

"On the other hand, if you find that said pit was disconnected and was not incident to the discharge of the duties of the deceased, and was not one of the instrumentalities incident to his employment, then the deceased should not assume such risk."

(Defendants except. Exceptions allowed.)

"(7) You are further instructed that in case you find that the negligent acts of the deceased, if any, contributed to his death, that such negligence, if any, on the part of the deceased would not entirely relieve the defendants of liability for his death, provided you find by a preponderance of the evidence that the defendants were guilty of negligence in keeping and maintaining such unlighted excavation or pit, but that such contributory negligence of the deceased diminishes his right to recovery in proportion to the amount of negligence attributable to said deceased employee; therefore, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, that negligence of the deceased is not a bar to recovery, but that the damages shall be diminished by the jury in proportion to the negligence of the deceased as compared with the combined negligence of himself and the defendants."

(Defendants except. Exceptions allowed.)

The issue as to whether or not, at the time of the accident complained of, the deceased was engaged in interstate commerce in the sense that his status was such as to bring him within the provisions of the federal Employers' Liability Act, was made by both the pleadings and the evidence, and that issue was submitted to the jury by the court in paragraph 4 of his charge, which is as follows:

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"You are instructed that if you find a preponderance of the evidence in this case that the deceased on the 2d day of November, 1915, was engaged as boiler washer in the town of Francis, Okla., in washing boilers used to haul commerce from the state of Oklahoma to another state, or from another state to the state Oklahoma, and that he register off about 7 o'clock p. m., and that he was requested to return to wash the boiler of the pile driver, which boiler was used in hauling said pile driver, or commerce from the state of Oklahoma to another state, or from another state to the State of Oklahoma, and that in obedience to said duty he returned to the defendants' yards in Francis preparatory to entering upon the duty of washing said boiler, and that while there, waiting to further engage in duties as boiler washer, in that event he would be engaged in interstate commerce."

(Defendants except. Exceptions allowed.)

We think this instruction sufficiently informed the jury as to the law upon the question involved, and that the court committed no error in giving the same.

The defendants' requested instructions which were refused by the court 9 to 15, inclusive, were upon the question of assumed risk and contributory negligence.

The rule in the United States courts is that a servant assumes all the ordinary risks of his employment which are known to him, or which could have been known to him with the exercise of ordinary care by a person of reasonable prudence and diligence under like circumstances and that risks which are not naturally incident to the servant's occupation, but which arise from the negligence of the master are not assumed by the servant until he becomes aware of such negligence and of the danger arising therefrom, unless the negligence and the risks are so apparent and obvious that an ordinarily prudent person would, under the circumstances, observe the one and appreciate the other. C., R. I. & P. Ry. Co. v. Ward, 173 Pac. 212; C., R. I. & P. v. Hughes, 166 Pac. 411; Dickinson, Rec'r, v. Granbery, Adm'r, 174 Pac. 776; Gila Valley G. & N. Ry. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; M. O. & G. R. Co. v. Overmyre, 58 Okla. 723, 160 Pac. 933; C. C., M. & O. Ry. Co. v. Roe, 180 Pac. 371, decided April 15, 1919, not yet officially reported.

[9] The defendants complain in their fifth and sixth assignments of error that the court erred in receiving the verdict of the jury apportioning the damages among the widow and minor children, and in rendering judgment upon the verdict.

We hold that there is no merit in these contentions, as a procedure in that respect has been approved in the following cases: St. L. & S. F. R. Co. v. Clampitt, 55 Okla. 686, 154 Pac. 40; Central Vermont Railway Co. v. White, 238 U. S 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; Norfolk & W. R. Co. v. Stevens, 97 Va. 631, 334 S. E. 525, 46 L. R. A. 367; I. & G. N. R. Co. v. Lehman (Tex. Civ. App.) 72 S. W. 619.

[7] The defendants complain of the ruling of the court in admitting and rejecting testimony upon the trial of this case.

We have examined the record and fail to find wherein prejudicial error is shown in the ruling of the court upon the law questions presented during the trial. The evidence in this case was conflicting, and in such cases where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial error is shown in the instructions of the court and its rulings upon the law question presented during the trial, the findings of the court will not be disturbed on appeal. Bunker v. Harding et al., 174 Pac. 749; Blasdel et al. v. Gower, 173 Pac.

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644; Shawnee National Bank v. Pool, 167 Pac. 994; Chicago, R. I. & P. Ry. Co. v. Pruitt, 170 Pac. 1143.

The judgment is affirmed.

SUPREME COURT OF OREGON.

GARVIN, ALIEN PROPERTY CUSTODIAN,

v.

WESTERN COOPERAGE CO.*

1. MASTER AND SERVANT—COMPLAINT SUFFICIENT WITHOUT ALLEGING MASTER'S REJECTION OF WORKMEN'S COMPENSATION ACT.

There being no presumption under the Workmen's Compensation Act as to whether the employer is subject thereto, the injured servant's complaint is not insufficient for failure to allege that defendant had elected not to come under the act, the matter being one of affirmative defense.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

2. ALIENS—NONRESIDENT ALIEN'S ACTION FOR SON'S DEATH PROPERLY BROUGHT BY DIRECTION OF FOREIGN CONSUL.

Under the treaties of the United States with Austria-Hungary, the Austrian consul general has authority to direct an attorney to bring an action under the Employers' Liability Act on behalf of a mother who is a subject and resident of Austria, for the death of her son.

(For other cases, see Aliens; Dec. Dig. § 16.)

3. DEATH—NONRESIDENT ALIEN MAY SUE EMPLOYER FOR DEATH OF SON.

A nonresident alien may maintain an action, under the Employers' Liability Act, for the death of her son against his employer.

(For other cases; see Death, Dec. Dig. § 31[2].)

Department 1.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Marja Rjacich against the Western Cooperage Company, in which Francis P. Garvin, as alien property custodian, was substituted for the plaintiff. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action wherein it is sought to recover damages for the death of one Mjo Riacich, of whom the plaintiff claims to be the mother. The substantial facts, as alleged in the complaint, are that Mjo Rjacich was a member of the section crew upon defendant's logging

Decision rendered, Oct. 7, 1919. 184 Pac. Rep. 555.

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railroad; that at the time of the accident resulting in his death he was riding upon one of defendant's engines; that at the same time other employees were loading a logging car, and that after it was partially loaded a bolt in the hand brake attached to the car broke, thereby releasing the brake, whereupon the car "ran wild," colliding with the engine upon which Rjacich was riding, and thereby caused the injuries which resulted in his death. The alleged negligence upon which the right of recovery is based consisted in spotting the car upon a dangerous and steep grade without using the necessary methods of anchoring the car during the operation of loading it, as follows:

(1) The defendant failed to provide "snubbing lines," consisting of a steel cable, one end of which is attached to the car, and the other end to some stationary object, which would safely hold the car in place.

(2) It neglected to safeguard the car with "safety chains," with which the car might be chained to the track.

(3) It neglected to provide safety or derailing switches with which to derail a "runaway" car.

(4) That the defendant, at the time of the accident, had a derailing switch installed below the grade where the car was being loaded, but it was spiked to the main line so as to be useless as as safety device.

(5) That it neglected to provide sound and substantial brakes on the logging car, and failed to take measures to see that the brakes were in good working condition.

The answer, after denials, pleads affirmatively as follows:

That on or about the 13th day of September, 1915, defendant was, and for some time prior thereto had been, conducting a logging business in Clatsop County, Ore.; that in connection with said logging business defendant operated a logging railroad; that, on or about the said 13th day of September, 1915, Mjo Rjacich was in its employ as a section hand, and at the time of his accident aforesaid he was riding on a locomotive belonging to defendant; that some distance away from the point of the accident a set of logging trucks were being loaded with logs at a logging rollway; that said trucks were practicallyy new, and had been purchased from a reputable concern, and had been manufactured by a reputable manufacturer; that the said trucks were of standard make, such as are used commonly in work of that kind, and had been properly inspected by the defendant; that each truck had a standard brake, with a brake-staff which could be tightened from the side; that when tightened the said brake-staff was held in place by means of a pawl, which fitted into a ratchet; that the said ratchet was attached to said said brake-staff by means of a metal pin, which ran through the said ratchet and said brake-staff; that while the said trucks were being loaded with logs the pin holding the ratchet attached to the forward brake-staff broke in some manner, thereby allowing the brakes to loosen from the wheels, and the said trucks, loaded with two logs, started down the track, colliding with the trucks loaded with logs attached to the locomotive aforesaid, on which locomotive the said Mjo Rjacich was riding; that by reason of said collision the said Mjo Rjacich received injuries from which he afterward died; that the pin which broke appeared amply sufficent, and was put in place by the manufacturers; that an inspection would not disclose any defect in said pin, and so far as this defendant knew, or could have known by the exercise of ordinary care, said pin was in good, first-class condition; and so far as defendant is concerned said accident was wholly unavoidable, accidental, and unforeseen, and could not have been prevented by it through the exercise of ordinary care.

A reply having been filed, there was a trial, resulting in a verdict and judgment for plaintiff, and defendant appeals.

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F. S. Senn, of Portland (Senn, Ekwall & Recken, of Portland, on the briefs), for appellant.

Charles T. Haas and M. H. Clark, both of Portland (Woerndle & Haas and A. E. Clark, all of Portland, and John T. Collier, on the briefs), for respondent Western Cooperage Co.

A. P. Dobson, of Portland, for respondent Garvin.

BENSON, J. (after stating the facts as above). [1] The first assignment of error is that the complaint is insufficient because it fails to allege that defendant had elected not to come under the Workmen's Compensation Act (Laws 1913, c. 112). The contention thus presented has been settled adversely to defendant's theory in Olds v. Olds, 88 Ore. 209, 171 Pac. 1046.

[2] It is then urged that the court erred in permitting plaintiff's attorney to testify that he was authorized and requested to commence the action in behalf of plaintiff at the request of and under the direction of the Austrian consul general The objection to this evidence was based upon the ground that under the statute no one but the mother is entitled to bring action, and that the consul cannot authorize the proceeding. This question also has been set at rest in the recent case of Ljubich v. Western Cooperage Co., 184 Pac. 551 (not yet officially reported), wherein it is held that, under the treaties of the United States with Austria-Hungary, the consuls of that country are, in effect, ex officio attorneys in fact, with ample authority in cases like the one at bar.

[3] The next assignment is that the court erred in holding that the plaintiff can maintain this action, being a nonresident alien. Although this question has been frequently discussed and passed upon in many other states, this is the first time that it has been presented for our consideration. The leading case in the United States supporting defendant's theory of the law is that of Deni v. Pennsylvania R. Co., 181 Pa. 525 37 Atl. 558, 59 Am. St. Rep. 676, which has been followed by a few of the other states, notably Wisconsin and Indiana, but a great majority of the states have held to the contrary. A leading case in support of plaintiff's right to maintain the action is that of Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, wherein the court, speaking by Mr. Chief Justice Holmes, says:

"In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in."

In the comparatively recent case of Anustasakas v. International Contract Co., 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (N. S.) 267, 130 Am. St. Rep. 1089, the Supreme Court of Washington in an interesting opinion, wherein are cited a large number of the cases supporting either contention, speaking by Mr. Justice Rudkin, says:

"The plea of alienage is not favored in law, and we are of opinion that the rule which permits nonresident aliens to maintain actions of this kind is supported by the weight of authority, and is more in harmony with the liberal cosmopolitan spirit of the age than the narrow, provincial rule which would close our courts to widows and orphans solely because they happen to be nonresident aliens."

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This case is also reported in 21 L. R. A. (N. S.) 267, where it is followed by an interesting note, citing practically all of the cases upon the subject.

At the conclusion of a brief and lucid discussion of the subject in 1 R. C. L. 825, is found this language:

"Since the statutes of the various states giving a right of action for negligent killing are copied from Lord Campbell's Act, the construction placed upon that act by a decision of the King's Bench in 1898 greatly influenced the courts which denied the right of action in the earlier cases; and, therefore, the disapproval of that decision in the later case before the same court, but by different judges, in 1901 would seem to weaken, to some extent at least, the weight of those earlier decisions of the state courts. It thus appears that the weight of authority, both in England and the United Sates, is that alienage is not a condition affecting a recovery for the death of a relative under the statutes allowing such an action."

We therefore adopt the doctrine that a nonresident alien is not precluded from maintaining the action.

[4] Error is assigned upon the action of the court in refusing to strike from the record the testimony of the witness Mike Erst'ch. The substance of the testimony of this witness is to the effect that his father and decedent's father were first cousins; that decedent and himself were both born at Dinovo, Austria, a village containing about 300 houses; that their homes were separated by the distance of about 15 minutes' walk; that they had both lived at Dinovo all of their lives, until Mjo Rjacich had come to Portland, about six years before his death, to which place the witness had followed about two and a half or three years later; that he had known the plaintiff from his earliest recollection; that he had been a frequent visitor at her home, which had also been the home of the decedent all of his life until he came to Portland; that in the home at Dinovo the plaintiff had treated the deceased as her son and called him her son; and that deceased had treated plaintiff as his mother, and had spoken of her as his mother. The witness also testified that the decedent had sent money to his mother, and that after decedent came to Portland, and before the witness left Dinovo, he saw the mother receive money which had been sent to her by decedent. It is urged that this evidence is incompetent for the reason that there is no other evidence in the record concerning the relationship of plaintiff and decedent, and that since this evidence consists of the declarations of the plaintiff, who is beyond the jurisdiction of the court, and of Mjo Rjacich, who is dead, that is belongs to that class of hearsay evidence which is admissible only when there is evidence dehors the declarations of the relationship of the declarant to the family. A careful analysis of this testimony shows that the witness himself is a relative; he says that he has known both declarants all of his life; that they bore the same family name, lived in the same house, conducted themselves toward each other as mother and son, and each addressed the other in a way to indicate such relationship. It will be at once observed that here is evidence, outside of the declarations of the plaintiff and Mjo Rjacich, tending to establish the relationship, being the direct evidence of the witness Erstich. In a very carefully considered case (State v. McDonald, 55 Ore. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444) testimony of this nature is held to be competent, and it was not error to admit it.

[5] Our attention is then directed to the fact that the court admitted in evidence a letter purporting to have been written by Matt Rjacich (a brother of Mjo Rjacich), mailed by him at a post office in Austria near Dinovo, and addressed to the witness Mike Erstich, who testified that it was a reply to one written by him, and that he recog-

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nized the handwritinig as that of Matt Rjacich. The letter, as translated by the interpreter then in attendance upon the court, reads as follows:

"Dinovo, date March 1, 1916.

"My dear Matt: I am letting you know that we are in good health, thank God, wishing that this letter will also reach you in good health. My dear Matt, I'm in receipt of your letter, and properly understand everything what you wrote me to send a power of attorney, and I'm afraid it would not be all right if we did not put all names and dates of birth of our family. Mother was called to the court yesterday, and they want us to give all names and date of birth and the court will mail it to you. If you had written us right away you would have got it long ago. Dear Matt, I ask you to do everything you can in this case. Dear Matt, answer right away. You will receive the power of attorney at any time. You can tell the court that you wrote for the power of attorney and that it did not get there yet. Dear Matt, nothing else to write, receive my sympathy from me.

"Your dear cousin, Matt Rjacich.

"Good-bye, awaiting your answer."

This letter was written before the present action was begun, and before there was any controversy as to the identity of Mjo Rjacich's mother, and it was offered in evidence for the purpose of showing relationship. The defendant maintains that it is incompetent as being hearsay and a self-serving declaration, made after the death of Mjo Rjacich, and therefore inadmissible. The plaintiff insists that it constitutes the declaration of a member of the family (who is out of the jurisdiction and whose declaration is therefore competent evidence) upon the question of pedigree. We are not much impressed with the probative value of the contents of the letter, and in fact find nothing of value in it, but, so far as it tends to establish the question of relatinship, we think it is clearly competent. In Thompson v. Woolf, 8 Ore. 454, this court says:

"Declarations of a deceased person or persons out of the state, who are related to a family, may be admitted to prove pedigree. But before such declarations can be admitted, the relationship of the defendant to the family must be proved by other evidence than his declarations."

Here we have the evidence of Erstich that the author of the letter is a brother of the decedent, Mjo Rjacich, and that he is out of the state, living in Dinovo, Austria. We know of no authority which makes any distinction between a written declaration and one that is spoken.

The fact that the letter was written after the death of Mjo Rjacich does not affect the admissibility of the declaration, unless it was made after the controversy had arisen, and upon this point the rule appears to be that the evidence is properly admitted if the declaration was made at a time when no controversy existed as to the precise question in regard to which the declaration is made. 2 Wigmore on Evidence, § 1483. In the present case the letter from Matt Rjacich was written before this action was begun, and before any question of the identity of the mother had arisen. We therefore conclude that the letter was properly admitted.

[6] The next assignment of error is based upon the action of the court in permitting J. F. Wood, the official court reporter, to testify from his report of the evidence in a former case the statement of W. E. Thomas, one of the defendant's attorneys, in a motion for a nonsuit, as follows:

"The defendant at this time moves for a nonsuit. This is made upon the ground that this action has not been brought by a person who is entitled to bring the action under the laws of this state, in a case of this kind. This action, the fact is, as disclosed by the evidence in this case,

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and as alleged in the pleadings, brings this case within the Employers' Liability Law, clearly and unquestionably. That being the case, an administrator of an estate cannot bring an action against a defendant under the conditions existing in this case. It is disclosed by the evidence that the deceased has a mother. Under the Employers' Liability Act of 1911 [Laws 1911, c. 3], § 4, this action cannot be brought by an administrator. The question was thereupon argued at length, and at the conclusion of said argument the court sustained the motion of defendant for a nonsuit to which action of the court in sustaining said motion plaintiff then and there by counsel duly excepted."

The introduction of this portion of the record of a former action in which the administrator sought to recover upon the same cause of action, was objected to by the defendant as irrelevant, incompetent, and immaterial, and tending to prove no issue in the case. The plaintiff argues that the statement above quoted contains a formal admission that the decedent had a mother living, and that, being inconsistent with defendant's attitude in the present action, the statement of its attorney is binding upon the client in this proceeding. In support of her contention, plaintiff calls our attention to certain cases, which we briefly consider. The first is Heywood v. Doernbecher, 48 Or. 359, 86 Pac. 357, 87 Pac. 530. From the opinion in this case counsel quotes the following:

"The admission of an attorney, made within the scope of his authority and during the continuance of his employment, bind his client to the same extent as a stipulation."

The effect of the language quoted is distinctly modified, however, by the next sentence, which reads thus:

"This rule is not invoked to charge the plaintiff with an acknowledgment of a fact prejudicial to its interests, but as tending to show the theory of its counsel as to the basis of the second cause of action."

The next citation is Missouri & K. Telephone Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771. This was a case in which the court admitted in evidence an admission of an attorney made in an opening statement to the jury in a former trial of the same case. In holding that it was properly admitted, the court says:

"In the statement was the admission of a material fact as to the action of the telephone company in the premises. From a reading of the record the admission appears to have been distinctly and formally made. In Lindley v. Railroad Co., 47 Kan. 432, 28 Pac. 201, it was held that the court is warranted in acting on the admission of a party made in the opening statement of a case to the court and jury, and might make a final disposition of the case where such statement absolutely precluded a recovery by him."

The holding in this case appears to be opposed to the great weight of authority. In 1 Ency. of Evidence, 469, we find the rule stated thus:

"The admission, to be binding, must be so made as to be a part of the evidence in the case, or formally made to avoid or excuse the making of proof. Therefore the mere admission or statement of counsel in an opening statement is not such as to amount to a binding admission."

"But there may be exceptions to this rule. Indeed, it has been held that an admission made by counsel in the opening statement may be conclusive of the case, and warrant a judgment without further proceeding" (citing a large number of authorities).

1 Greenleaf on Ev. § 186, sates the rule thus:

"The admissions of attorney of record bind their client in all matters relating to the progress and trial of the case; but to this end they must be distinct and formal, or such as are termed solemn admission, made for

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the express purpose of alleviating the stringency of some rule or practice, or of dispensing with the formal proof of some fact at the trial."

The next case to which our attention is called is Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539, which was a case wherein the attorney for plaintiiff made an opening statement which disclosed that he was seeking to recover upon a contract which was corrupt, immoral, and contrary to public policy. The defendant thereupon moved for a directed verdict, and the court asked the attorneys for the plaintiff if they claimed or admitted that the statements which had been made were true, and counsel replied in the affirmative, whereupon the motion was granted. This appears to be a clear case of an exception to the general rule, and properly so.

Our consideration is also invoked for a statement of the rule found in 16 Cyc. 965, as follows:

"Relevant, judicial statements made or adpoted by a party, although made without the knowledge or consent of his attorney, are when received by the court, admissible, not only in the case in which they are made, but in any subsequent trial or proceedings connected with it and in other cases in which the facts covered thereby are relevant. * * * Judicial admissions are frequently those of counsel or attorneys of record. When these are made in good faith, in the counsel's professional capacity, for the purpose of dispensing with evidence, and to that end are distinct and formal, they bind the client, whether made before, on, or after the trial."

In attempting to relate these authorities to the case at bar, counsel has apparently overlooked certain important considerations. The statement of Mr. Thomas was made in argument in support of his motion for a nonsuit, in another action, in which the present plaintiff was not a party. In the case of Brown v. Oregon Lumber Co., 24 Or. 315, 33 Pac. 557, Mr. Chief Justice Lord says:

"'A motion for a nonsuit is in the nature of a demurreer to the evidence; it admits not only all that it tends to prove. The evidence given for the plaintiff must be taken to be true, together with every inference of fact which the jury might legally draw from it."

In effect, then, Mr. Thomas' statement amounts to saying:

"If we admit, and for the purpose of this motion we do, that every item of evidence offered by plaintiff is true, nevertheless plaintiff, as administrator, cannot maintain this action, because he has offered evidence to prove that the decedent has a mother living, to whom the statute gives the exclusive right of action."

If an admission of this sort is binding upon the client in a subsquent action, properly brought, then every motion for a nonsuit becomes an admission against interest. We have been unable to find authorities which would justify such a conclusion. The admission of the statement was error.

[7] It is then argued that the court erred in sustaining plaintiiff's objection to the following question asked of the witness Robinson upon cross-examination: "Do you know what kind, what make, of truck this was?" This witness, who was superintendent of logging operations for the defendant company, had been called as a witness for the plaintiff, and had been examined as to the various precautions in regard to safety of employees, but had not been examined with reference to the trucks. Plaintiff objected to the question upon the ground that it was not proper cross-examination, but was a part of defendant's direct case. It will be noted that the answer alleges that the truck was of a standard make, practically new, etc. The question was clearly directed to establishing an affirmative defense, and was not proper cross-examination. It may also

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be observed that upon the defense witnesses were permitted, without objection, to describe the truck in detail. There was no error in the ruling of the court.

[8] The same witness, who had at a prior time testified at the coroner's inquest relative to the same accident, gave some testimony which appeared to be inconsistent with his testimony at such inquest; whereupon over the objection of defendant, counsel for plaintiff was permitted to question him as to his former statements, and, he having denied making such statements, they were read into the record, and this is assigned as error. This assignment is fully answered by section 861, L. O. L., and the case of State v. Steeves, 29 Or. 85, 43 Pac. 947.

[9] The witness Lew McCutcheon testified that he had worked in logging camps for 15 or 16 years, and has worked in nearly every possible capacity, and that his work had been altogether in camps using trucks. He then testified, from his observation and experience, in regard to the use of snubbing lines, safety chains, safety and derailing switches, and other safety appliances, and was then asked this question: "Would you or would you not say now that on logging roads where there are grades safety lines are used, and safety rails and derails, and the means you have described as means of safety?" The answer of the witness was, "Yes, sir." To this question and answer the defendant objected upon the ground "that it is incompetent, irrelevant, and immaterial, and no proper foundation laid, and does not prove any issue in the case, and calls for a conclusion." It is argued that this was error, and in support of such contention our consideration is directed to the case of Trickey v. Clark, 50 Or. 526, 93 Pac. 457. In that case the defendants called expert mill men, who testified that the lever in use at the time of the accident was provided with a reasonably safe and proper lock and fastener. This court very properly held that such evidence was incompetent, since it was directed to the principal issue in the case, i. e., was it negligence upon the part of the defendants to use the device which they did use? The jury had before them a model of the device, and its workings were fully explained to them, so that they were as competent as any expert to determine its utility. The testimony of McCutcheon in the present case stands upon a very different footing. The case upon which appellant relies was one founded upon the common law, that an employer must provide for his servant a reasonably safe place to work and reasonably safe appliances. The vital point for the jury to determine was whether or not the device used was reasonably safe, and no witness could be permitted, to answer that question for them. The present action is based upon the Employers' Liability Law, § 1, which requires the employer to—

"use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and, without regard to the additional cost of suitable material or safety appliance and devices."

It must be noted that the testimony of the witness was directed to the practicability of certain safety devices, and the fact that in other places he had seen them in use. In Love v. Chambers Lumber Co., 64 Or. 129, 129 Pac. 492, we find this language:

"The complaint alleged that it was practicable for defendant to have so guarded the machinery as to have prevented the accident without interfering with its ordinary use. This was denied in the answer, so it became necessary for plaintiff to establish the proposition that it could be so guarded. No better evidence could have been introduced for this purpose than to show that after the accident the machinery had been so guarded and that such safeguards had not in any way impeded or interfered with its operation."

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In Camenzind v. Freeland Furniture Co., 89 Or. 158, 174 Pac. 139, this court held that it was proper to admit evidence of a safety appliance then in use in Switzerland, although nothing like it was known in the United States. We are therefore of the opinion that the evidence was properly admitted.

[10] Defendant further assigns as error the refusal of the court to give certain requested instructions, the first of which reads thus:

"Defendant company further states that the cause of the runaway was the breaking of a drift pin which passed through the ratchet and brakestaff; that there was a defect in this pin which the defendant company did not know or could not have known was present; and that such defect was a latent or hidden defect, and that the defendant could not have known of this defect by the exercise of that degree of care which the law requires."

This requested instruction is of value only when read in connection with the next one, and counsel for defendant very properly presents them in his argument together. The other one reads thus:

"The defendant company was not an insurer of the safety of its car and appliances; it was required to use every degree of care and caution which it was practicable to use in carrying on its work; and if you find that his casualty resulted because of the breaking of the drift pin through the ratchet and brake-staff, and that this pin was crystallized, or had in it a hidden defect which this company did not know, or could not have known by the exercise of that degree of care which the law requires, then I instruct you that the plaintiff cannot recover in this action, and your verdict must be for the defendant."

The theory of defendant appears to be that, since an employer is not liable for hidden defects in the appliances furnished, if he had used every care and precaution practicable in the inspection of the devices actually in use he is absolved from all liability for injuries resulting from such latent defects. It may be that the authorities under the common law, and prior to the enactment of the Employers' Liability Act, would have justified such a contention, but that statute has very greatly enlarged the legal obligations and liabilities of the employer. It declares that the employer—"shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 4 of the act provides for the recovery of damages for any loss of life resulting from any violation of the requirements of the law. The complaint charges negligence in not using snubbing lines, safety switches, derailing devices, etc., and there was evidence supporting such allegations. The jury, therefore, could not be limited to a consideration of the one item of negligence based upon the defective drift pin, and the instruction was properly refused.

[11] The last assignment of error is that the court refused to give the instruction requested by defendant upon the subject of the measure of damages. The portion thereof which is contended for reads thus:

"Your verdict must be based on the pecuniary loss which the plaintiff has suffered, and in arriving at this amount you may take into consideration the money support which the deceased, in your judgment, would have contributed to the mother during the mother's lifetime. You may consider the age of the mother, if you know her age, and ascertain the probable length of her life: you may consider whether he would have contributed to the mother in the future, and for what length of time."

Instead of this the court gave the following instruction:

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"In ascertaining such damages you may take into consideration the age of the deceased, his expectancy of life as disclosed by the evidence, his health, ability, habits of industry, mental and physical skill; if you find that any such qualities are established by the evidence, his capacity for earning money by rendering service to others, or accumulating money or property, if any, the amount which deceased would probably have saved from his earnings or by his skill or bodily labor, if any, during the expectancy of his life. That is the measure of damages."

It is conceded that this instruction as given is in harmony with the rule as enunciated by this court in McClaugherty v. Rogue River Electric Co., 73 Or. 135, 140 Pac. 64, 144 Pac. 569. But it is urged that the rule thus declared is inconsistent with the doctrine of McFarland v. Oregon Electric Co., 70 Or. 27, 138 Pac. 458, Ann. Cas. 1916B, 527, and that the latter is the more logical conclusion. We have examined both cases with care, and fail to find the inconsistency which appellant seeks to point out. In the case of McFarland v. Oregon Electric Railway Co. the court simply held that in an action under the Employers' Liability Act, the plaintiff is not entitled to recover for the loss of the society of the deceased, for that was the specific question which was submitted. But if it were otherwise, the later case of McClaugherty v. Rogue River Elec. Co. has met the approval of this court in Yovovich v. Falls City Lumber Co., 76 Or. 585, 149 Pac 941, and impresses us as most satisfactorily declaring the measure of damage in this class of cases.

For the error in admitting in evidence the statement of Mr. Thomas in arguing a motion for nonsuit in a former action, the judgment must be reversed, and the case is remanded for a new trial.

McBride, Burnett, and Harris, JJ., concur.

SUPREME COURT OF PENNSYLVANIA.

CLARK

v.

LEHIGH VALLEY COAL CO.*

1. MASTER AND SERVANT—ON REVIEW BY WORKMEN'S COMPENSATION BOARD OF FINDINGS OF FACT, HEARING DE NOVO.

A hearing de novo by the Workmen's Compensation Board is essential, whenever the intention is to disturb findings of fact, and the board, on considering the report of a referee, had no power to substitute its own inferences and deductions for those already upon the record.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—DAMAGES RECOVERABLE FOR INJURY CAUSING DEATH IN COURSE OF EMPLOYMENT.

Under the Workmen's Compensation Act, an injury resulting in death need not arise out of or be due to the workman's employment; it being sufficient if it happened in the course thereof.

(For other cases, see Masteer and Servant, Dec. Dig. § 371.)

*Decision rendered, April 28, 1919. 107 Atl. Rep. 858.

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3. MASTER AND SERVANT—RUPTURE CONSTITUTING ACCIDENTAL "VIOLENCE TO THE PHYSICAL STRUCTURE OF THE BODY."

Where an employee died in the course of his employment from a rupture of the aorta, caused by "an extra effort in vomiting," a claimant, irrespective of anterior causes, was entitled to compensation, as the rupture itself occurring from such effort would constitute accidental "violence to the physical structure of the body."

(For other cases, see Master and Servant, Dec. Dig. § 373.)

4. MASTER AND SERVANT—NATURAL DEATH CAUSED BY CHRONIC AILMENT GIVES NO RIGHT TO COMPENSATION.

If death occurs during course of employment in an ordinary way natural to progress of employee's disease, with which he was afflicted before the accident, there can be no recovery; but, if death results from an injury due to some accident in the course of his employment, the fact that employee had a chronic ailment, rendering him more susceptible to such an injury, will not defeat the right to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

5. MASTER AND SERVANT—FINDINGS OF FACT BY REFEREE CANNOT BE REVERSED BY WORKMEN'S COMPENSATION BOARD WITHOUT HEARING DE NOVO.

Where referee found that employee's death in course of his employment was due to a rupture of the aorta caused by an "extra effort in vomiting," probably due to noxious gases, the smell of his burning clothing, or fright, the Workmen's Compensation Board, without a hearing de novo, had no power to reach different conclusions, or reverse referee on theory of his error of law in drawing deductions different from which would have been made by board.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Court of Common Pleas, Luzerne County.

Proceeding under the Workmen's Compensation Act by Bridget Clark against the Lehigh Valley Coal Company for compensation for the death of her husband. From a judgment dismissing an appeal from the Workmen's Compensation Board, reversing an award of a referee in favor of claimant, she appeals. Judgment and order of board reversed, and award of referee reinstated and affirmed.

Argued before Brown, C. J., and Moschzisker, Frazer, Simpson, and Kephart, JJ.

Roger J. Dever, of Wilkes-Barre, for appellant.

P. F. O'Neill and F. W. Wheaton, both of Wilkes-Barre, for appellee.

MOSCHZISKER, J. Bridget Clark, widow of Patrick Clark, sought compensation for the death of her husband. The referee found in her favor, but the Workmen's Compensation Board reversed. The common pleas of Luzerne county affirmed the board, and claimant has appealed to this court.

The referee reported, inter alia, as follows:

"The testimony in this case shows that Patrick Clark, the claimant's husband, was employed by defendant company in looking a er a lin of pipe used for the purpose of conveying silt from the surface into

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mine. His duties were to keep that line in repair, and, in order to enable him to examine it under ground, he carried an open lamp. On the morning of February 23, 1916, his lifeless body was found inside the mine, a short distance from this pipe line, and his lighted lamp about two feet away from him. His clothing was burning, and he had severe burns upon his body. He was in a kneeling position, on his hands, and apparently had been vomiting. That he was on the premises of his employer, and engaged in the performance of his duty, at the time of his death, is undisputed. That his duties required him to carry an open lamp is not denied, and no theory is advanced for the burning of his clothes and body, other than they were burned by this lamp. The medical testimony establishes the fact that death was due to a rupture of the aorta, which is a large blood vessel leading from the heart."

The report also contains these further findings:

(1) "The vomiting was due to probably one of three causes, either noxious gases, the smell of the burning clothing, or fright from discovery of his clothing being on fire"; (2) deceased was afflicted with a "syphilitic condition, in which he might have lived four or five years, or his death might have occurred at any time"; (3) although this condition rendered deceased more susceptible to a rupture of the aorta than he otherwise would have been, yet in point of fact the rupture was immediately "caused by extra effort in vomiting"; finally (4) deceased "met with an accident and sustained injuries which caused his death," while engaged in "discharging his duties" as an employee of defendant.

Defendant asked review by the Compensation Board upon the ground of lack of evidence to sustain the referee's finding of fact that "the death of decedent was due to a rupture of the aorta, * * * caused by extra effort in vomiting, due to one of three causes," etc.; and its appeal was classed by the board, not as raising a question of fact as to whether the evidence warranted, or justifed, this finding, but rather as involving a pure point of law concerning the presence of any evidence to sustain the finding. The board decided there was no such evidence, and therefore set aside the referee's compensation order.

[1] We say the appeal was classed as involving a question of law, and not of fact, because the referee was reversed without a hearing de novo, such a hearing being essential whenever the intention is to disturb findings of fact (McCauley v. Imperial Woolen Co., 261 Pa. 312, 318, 319, 104 Atl. 617); but, notwithstanding this classification, when considering the report of the referee, instead of merely searching to see if there was any evidence capable of sustaining that official's findings of fact, the board substituted its own inferences and deductions for those already upon the record, which, on such a review, it lacked power to do (McCauley v. Imperial W. Co., supra, 261 Pa. 319, 104 Atl. 617; Dainty v. Jones & L. S. Co., 263 Pa. 109, 113, 106 Atl. 194).

As some explanation of the erroneous course thus pursued, the report of the board indicates a fundamentally wrong idea of its powers and duties For instance, it is there stated:

"[1] We have no evidence that will justify us in connecting the vomiting with the death, nor [2] the burnt clothing with the vomiting."

Whereas, on the appeal then pending, neither was a proper test to be applied.

[2, 3] We shall consider the second test first. Under the Pennsylvania statute (Act June 2, 1915 [P. L. 736]) the injury need not arise out of, or be due to, the person's employment, it is sufficient if it happens in the course thereof. Lane v. Horn Hardart Baking Co., 261 Pa. 329, 335, 104 Atl. 615. Here, concedely, Clark died in the course of his employment, but the question is: Did he meet death as a result of accidental "vio-

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lence to the physical structure of the body"? McCauley v. Imperial W. Co., supra, 261 Pa. 327, 104 Atl. 617. Irrespective of anterior causes, if the vomiting took place, and this "extra effort" caused the rupture of the aorta, these facts were sufficient to entitle the claimant to compensation, and it was not essential that the "burnt clothing" should be connected with the vomiting. In other words, the rupture itself, occurring from "extra effort in vomiting," would, under the circumstances, constitute accidental violence to the physical structure of the body, within the broad meaning of that term as heretofore defined by us. McCauley v. Imperial W. Co., supra, 261 Pa. 326, 327, 104 Atl. 617; Lane v. Horn & Hardart Co., supra.

[4] In addition to the error just discussed which is typical of others of a like character, the report of the board strongly suggests a mistaken view of the law relative to the bearing upon the case of Clark's diseased condition, prior to and at the time of the vomiting which brought on the rupture resulting in his death; while the fact that he suffered from a malady which, in time, might have terminated fatally, called for consideration, it was in no sense controlling. If death comes, during the course of employment, in an ordinary way, natural to the progress of a disease with which one is afflicted, and with which he was smitten before the accident, there can be no recovery (McCauley v. Imperial W. Co., supra, 261 Pa. 327, 104 Atl. 617; Lane v. Horn & Hardart Co., supra, 261 Pa. 333, 104 Atl. 615); but, if the demise is brought about by an injury due to some mishap, or accident, happening during the course of his employment, the fact that deceased had a chronic ailment which rendered him more susceptible to such injury than an ordinary person would be, will not defeat the right to compensation. Upon this subject, see Bradbury's Workmen's Compensation Law (3d Ed.) 326 to 340, where a general discussion will be found citing many cases illustrative of the trend of judicial opinion, which supports the law as we have stated it, among others, Madden's Case, 222 Mass. 487, 494, 111 N. E. 379, L. R. A. 1916D, 1000. Certain of the cases cited are governed by statutes which differ somewhat in legislative language from the Pennsylvania act; but in no instance is this difference of a character to affect the relevancy of the decision, so far as it involves the point now before us.

[5] All of which brings us to a consideration of the first test, supra, applied in examining the referee's findings and the testimony relating to the cause of Clark's death. At this point the board mistook its powers and duties as an appellate tribunal, and thereby fell into material error. The question was not as to the existence of evidence which, in the opinion of the reviewing body, would "justify" it "in connecting the vomiting with the death," but was there any evidence which, within the bounds of reason, possibly could be held to sustain the referee's findings connecting the vomiting and death? If such evidence appeared (and the referee's findings indicate it did) then, albeit the board on a hearing de novo, might draw other inferences therefrom and reach conclusions differing from those upon the record before it, yet in the absence of such a hearing, it was beyond the power of that body so to do; and, on the then pending appeal, it was likewise beyond its power to reverse the referee on the theory that he had erred, as a matter of law, in drawing deductions from the testimony different from those which would have been made by the board; this, nevertheless, is, in effect, what the latter undertook to do.

Therefore the conclusions of law pretending to assert a lack of evidence to sustain the findings of the referee, having been arrived at through an examination that ignored the controlling rules which should have guided the board, cannot stand, and the only findings of fact properly before us are those of the referee. In the absence of correctly derived conclusions of law to overcome these findings, they are decisive (McCauley v. Imperial W. Co., supra, 261 Pa. 329, 104 Atl. 617); thereon claimant is entitled to compensation, and the board erred in deciding otherwise, as did the court below.

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The judgment of the common pleas and the order of the Compensation Board are both reversed; the award of the referee is reinstated and affirmed.

SUPREME COURT OF PENNSYLVANIA.

TIGUE

v.

FORTY FORT COAL CO.*

MASTER AND SERVANT—ON APPEAL FROM REFEREE'S FINDINGS OF FACT HEARING DE NOVO.

The workmen's compensation board cannot reverse an award of compensation upon an appeal from the referee's findings of fact without a hearing de novo.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Court of Common Pleas, Luzerne County.

Proceeding by Bridget Tigue against the Forty Fort Coal Company for compensation under the Workmen's Compensation Act (Act June 2, 1915 [P. L. p. 736]). From a judgment reversing the decision of the workmen's compensation board, which reversed an award of compensation made by the referee, and entering judgment in favor of the claimant for the death of her husband according to the recommendation of the referee defendant appeals. Appeal dismissed, and award of referee affirmed.

Argued before Brown, C. J., and Moschzisker, Frazer, Simpson, and Kephart, JJ.

Benjamin R. Jones, of Wilkes-Barre, and John R. Wilson, of Scranton, for appellant.

Roger J. Dever, of Wilkes-Barre, for appellee.

PER CURIAM.. The referee found that at the time claimant's husband, an employee of the defendant, was killed, he was returning from work "on the premises of defendant company," and that "at the time of the accident the decedent was leaving his place of employment by a customary route of going to and from the Fourt foot tunnel to the homes of employees and was along or over the railroad tracks on property of defendant company inclosed by a fence." From these findings of fact the Forty Fort Coal Company appealed to the compensation board, which reversed the award of the referee, without a hearing, de novo. This it could not do McCauley v. Imperial Woolen Co. et al., 261 Pa. 312, 104 Atl. 617. And the learned court below properly sustained the claimant's appeal to it.

Appeal dismissed, and award of referee affirmed.

*Decision rendered May 5, 1919. 107 Atl. Rep. 862.

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SUPREME COURT OF WASHINGTON.

GOWEY

v.

SEATTLE LIGHTING CO. (No. 15338.)*

1. MASTER AND SERVANT—EXTRAHAZARDOUS OCCUPATION IN "FACTORY" OR "WORKSHOP" WITHIN WORKMEN'S COMPENSATION ACT.

Under Workmen's Compensation Act (Rem. Code 1915, §§ 6604—2, 6604—3), enumerating hazardous works, and defining "workshops" as places where machinery is used, and "factores" as undertakings in which the business of working at commodities is carried on with power-driven machinery, a gas company's general office, in which clerical work is carried on by a woman clerk injured in operating a power-driven machine for making plates for printing bills, is a factory or workshop, though her principal duties are clerical.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Factory; Workshop.)

2. MASTER AND SERVANT—RIGHT OF ACTION ON DEFAULT IN PAYMENTS BY MASTER UNDER WORKMEN'S COMPENSATION ACT.

Workmen's Compensation Act (Rem. Code 1915, § 6604—8), as amended by Laws 1917, p. 487, does not preserve the right of action existing in favor of an injured employee who would otherwise fall within the Workmen's Compensation Act against an employer who fails to pay into the accident fund the amount it would be required to contribute thereto, because the employee was within the act.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Elizabeth C. Gowey against the Seattle Lighting Company. From a judgment for defendant, plaintiff appeals. Affirmed.

James Kiefer, of Seattle, for appellant.

Poe & Falknor, of Seattle, for respondent.

PARKER, J. The plaintiff, Elizabeth C. Gowey, commenced this action in the superior court for King county, seeking recovery of damages for personal injury which she claimed resulted to her from the negligence of the defendant lighting company. One of the defenses set up by the defendant in its answer is that the injury for which the plaintiff seeks recovery was received by her while engaged in an extrahazardous employment within the meaning of the Workmen's Compensation Act (Rem. Code 1915, §§ 6604—1 to 6604—32), and that therefore she must recover, if at all, from the accident fund provided for in that act. The cause was decided by the court in favor of the defendant and against the plaintiff upon this defense at the beginning of the trial, as a matter of law. While the question was first presented to the court in the form of a mo-

*Decision rendered, Oct. 15, 1919. 184 Pac. Rep. 339.

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tion for judgment in favor of the defendant upon admitted facts appearing in the pleading, there were some additional facts agreed upon by counsel for both sides and stated to the court upon the argument of the motion. These additional facts appear in this record by statement of facts duly settled and signed by the trial judge. From the judgment of dismissal rested upon the facts so appearing, the plaintiff has appealed to this court.

[1] The controlling facts may be summarized as follows:

"Defendant is * * * a corporation * * * and owns and operates a plant for the manufacture and sale of gas in the city of Seattle, and maintains in connection therewith general offices. * * * On the 24th day of April, 1918, the plaintiff was in the employment of the defendant and engaged in the operation of a multiple head imprinter of the type 'F,' and that it was the duty of the plaintiff in the operation of said machine to make certain zinc plates or stencils for the printing of gas bills. * * * Said machine is run by electric power, and in its complete condition has in front of the dies a metal guard placed thereon to prevent the crushing or catching of fingers of the person operating said machine, and prior to said 24th day of April, 1918, and by the orders of said Miller in charge of said office, the said guard had been removed from said machine in order to speed up the operation thereof, and said removal was unknown to the plaintiff, and had said guard been on said machine the accident to plaintiff could not possibly have occurred."

The machine "was used in the office of the defendant as an office device or appliance." The plaintiff was a clerk in the general office of the defendant, and, while the larger part of her duties were clerical, it was also a part of her employment to operate this machine. Plaintiff's hand was injured by the die of the machine coming down upon her hand when the electrical power was applied by another, at a time when she was not expecting the machine to start. In view of our conclusion touching the correctness of the decision of the trial court, it is not necessary for us to further notice the manner or extent of the plaintiff's injury, or the alleged negligence of the defendant.

Among the extrahazardous works enumerated in the Workmen's Compensation Act (section 6604—2, Rem. Code) are "factories, mills and workshops where machinery is used." In section 6604—3 as amended by Laws of 1917, p. 474, "factories" and "workshop" are defined as follows;

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

"Workshop means any plant yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control."

In section 6604—4, Rem. Code, as amended by Laws of 1917, p. 478, under the general heading "Factories Using Power-Driven Machinery" are enumerated, among other things, for the purpose of specifying the amounts to be contributed towards the accident fund by employers, the following: "Stamping tin or metal," canneries, metal stamping extra;" "zinc, brass or lead articles or wares not otherwise specified;" "printing." It seems plain to us, that the word "factories," as used in the general heading under which these enumerations appear is used in a very general sense and means workshops as well, since there there is no general head-

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ing containing the word "workshop," and the above-quoted items are as appropriate to work done in workshops as in factories

Was the office of the defendant a "factory" or "workshop" wherein power-driven machinery was being employed, in so far as the operation of this machine by electric power in the making of zinc plates or stencils was concerned, within the meaning of the Workmen's Compensation Act? We think it was. It is plain that the machine was a power-driven machine, and that the operation of it in the making of zinc plates or stencils was the manufacture and change of zinc plates into the form of stencils; we also think the conclusion cannot be escaped that such work was extrahazardous, regardless of the fact that it may have been carried on in the general offices of the defendant rather than in some place apart from the office. Plainly, it was not clerical work. Its character, to our mind, was not different than if it had been carried on in a manufacturing plant devoted exclusively to such work. We are equally convinced that the plaintiff was engaged in extrahazardous work when she was operating this machine, though she also had other duties of a clerical nature, even though such duties constituted the larger part of her employment. The following decisions lend support to these conclusions: Wendt v. Ind. In. Com., 80 Wash. 111, 141 Pac. 311; Guerrieri Industrial Insurance Com., 84 Wash. 266, 146 Pac. 608; Replogle v. Seattle School District No. 1, 84 Wash. 581, 147 Pac. 196; State v. Business Property Security Co., 87 Wash. 627, 152 Pac. 334; Remsnider v. Union Savings & Trust Co., 89 Wash. 87, 154 Pac. 135, Ann. Cas. 1917D, 40.

Some contention is made rested upon the fact, which for present purposes we may deem as admitted, that the machine when in perfect working order, with all of its attachments in place, rendered injury to the operator practically impossible. Such might be said of many machines to be found in factories and workshops, but the fact remains that it was possible for the machine to be in such condition that an operator's hand could be crushed. Plainly, we think, the impossibility of injury to the operator of a machine when it is in perfect order does not render its operation other than extrahazardous employment within the meaning of the compensation act.

[2] Some contention is made rested upon the fact that the defendant had failed to pay into the accident fund the amount it should be required to contribute thereto because of the employment of the plaintiff and others in the operation of this machine. This contention is rested upon section 6604—8, Rem. Code, relating to employers who are in default in such payments, and preserving to an injured workman his right of action against such defaulting employer. This, however, is no longer the law, since that section was amended by the laws of 1917, p. 487, wherein the right of action existing in favor of an injured employee against such defaulting employer is not preserved as it was under that section as originally enacted. Freyman v. Day, 182 Pac. 940, just decided.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

Holcomb, C. J., and Bridges and Mount, JJ., concur.

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SUPREME COURT OF APPEALS OF WEST VIRGINIA.

WILKIN

v.

H. KOPPERS CO.*

1. MASTER AND SERVANT—MASTER NOT LIABLE WHEN HIS NEGLIGENCE NOT PROXIMATE CAUSE.

Though an employer within the terms of the Workmen's Compensation Act fails to avail himself of the benefit of the statute, he is not liable for an injury sustained by an employee in the course of his employment, in the absence of negligence on the part of the former which is the proximate cause of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Error to Circuit Court, Brooke County.

Action by William S. Wilkin, administrator, against the H. Koppers Company. Verdict and judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and case remanded.

Jno. J. P. O'Brien and Leo A. Coleman, both of Wheeling, for plaintiff in error.

R. L. Ramsay, of Wellsburg, and W. S. Wilkin, of New Cumberland, for defendant in error.

LYNCH, J. John Tsouvalakis, plaintiff's intestate and an employee of the defendant was killed accidentally while on his way to and about to enter upon the premises on which he was engaged to work, then only in the temporary control of the defendant, who had and exercised no right to control the operation of the railroad. The railroad right of way and tracks and the premises so controlled by defendant were not subject to joint ownership or control, but were held under different titles, though the properties lay immediately adajcent to each other. To the place of employment but two ways of approach about half a block apart were used by defendant's employees, and in using either of the two they were obliged to cross three tracks of the railroad company. One was a public crossing; the other a short cut used by many of its employees, with its knowledge and acquiescence, who for their own convenience preferred to cross the tracks at that point. It was this second route that the deceased took as he was approaching the plant for work on the night shift. Each of the two outside tracks was occupied by idle freight cars on the evening of the accident, and decedent either undertook to crawl under or pass between the cars on the bumpers, and then onto the middle track, where he was struck by the train and killed.

[1] Liability for decedent's death, as averred in the declaration and argued by counsel, rests solely upon the breach of the common-law duty requiring the master to provide for his servants a reasonably safe place in which to work and reasonably safe means of acccess thereto, without the benefit of the usual common-law defenses. They are not available because defendant, though clearly within the terms of the act, failed to elect to pay into the workmen's compensation fund the premiums provided

*Decision rendered, Sept. 16, 1919. 100 S. E. Rep. 300. Syllabus by the Court.

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by law to entitle him to its benefits. But even under those circumstances plaintiff's intestate cannot lawfully be entitled to the benefit of a recovery, unless death resulted from some negligent act or omission to act which at common law required the master to respond in damages. For no such liability can arise except from the wrongful act, neglect, or default of the employer or any of his officers, agents, or employees. Section 26, c. 15P (sec. 682), Code 1913; Watts v. Ohio Valley Electric Ry. Co., 78 W. Va. 144, 88 S. E. 659; Louis v. Smith-McCormick Construction Co., 80 W. Va. 159, 92 S. E. 249.

[2] The duties of a master towards his servants while upon his own premises, or premises under his control, are established by abundant authority. According to them he is bound to exercise due diligence in furnishing them with a reasonably safe place and safe appliances in and with which to work, and reasonably safe means of access to the place assigned them to work, and exits therefrom while in his employ on his premises, including, according to Jones v. Railroad Co., 74 W. Va. 666, 83 S. E. 54, L. R. A. 1915C, 428, a reasonable time and opportunity to depart therefrom. Violation of none of these duties is charged or proved against defendant. Decisions dealing with breaches of duties committed elsewhere than on the premises owned or controlled by the master include only those secured to the employee by virtue of some provision of his contract of employment, so far as we have been able to discover.

[3] Outside of decisions under Compensation Acts, the cases are few which discuss the extent of the duty of the employer to provide, beyond the limits of his own possession or control, safe means of ingress and egress to and from his premises for the convenience and safety of his employees. This lack of authority may be accounted for to some extent by the fact that Workmen's Compensation Acts have largely supplanted the common law dealing with employers' liability. The test under these acts now is: Did the injury arise out of and in the course of the employment? It would seem, however, that decisons under such statutes treating of situations analogous to the one now considered, where the plaintiff was injured while off the premises and on his way either to or from work, would properly serve as authority illustrative of the scope of the duty owed in this case. It is safe to say that, wherever at common law the duty existed to provide proper means of access to the property for the employees, an employee injured in such a situation would be held under the Compensation Acts to be within the scope of his employment. The converse, however, is not true, for these acts have been given a broader scope and meaning, permitting an employee to recover compensation he could not have recovered under common-law principles. Hence, whenever an authority is found denying a right to compensation on the ground that the injury sustained by the employee while on his way to or from work was beyond the course of his employment, it is safe to say that the same court would under similar circumstances hold that there had been no violation of the general duty to provide a reasonably safe and convenient means of access to the premises; and there is this further reason for considering decisions under compensation acts as authority in this case. Secton 26, c. 15P (sec. 682), Code, provides that employers subject to the act, who have not paid into the compensation fund the premiums provided by the act, shall be liable to their employees for damages suffered by reason of personal injuries "sustained in the course of employment." Under this section, therefore, the right to recover for personal injuries caused by the wrongful act, neglect, or default of the employer is subject to the same test as the right to compensation where the employer had complied with the provisions of the act.

In De Constantin v. Public Service Commission, 75 W. Va. 32, 83 S. E. 88, a case arising under our Compensation Act, a rule is laid down

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which we think is applicable to the case before us. The second point of the syllabus is:

"An injury incurred by a workman, in the course of his travel to his place of work and not on the premises of the employer, does not give right to participation in such fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment, of its use by the servant in going to or returning from his work."

As said in the body of the opinion, the scope of the employment does not terminate at the instant the employee lays down his tools, but continues for a reasonable time thereafter, while he is preparing to leave and leaving the premises. But if, says the opinion, "the employee, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

[4, 5] Likewise the duty to provide a reasonably safe and convenient means of access to the premises and plant of the employer generally is coextensive with, but not outside of, the limits of the premises under his control. There is no charge that defendant has failed in any duty so far as his own premises are concerned. But plaintiff by his declaration, proof and argument rests his right of recovery upon the breach of an alleged duty to use adequate means to safeguard such of defendant's employees as voluntarily elected not to avail themselves of a crossing duly guarded, less dangerous, and readily accessible to them, though the shorter route, with the knowledge and acquiescence of the defendant, as being a more convenient way of approach to and departure from the place appointed for them to convene mornings and evenings for the purpose of registration.

An examination of some analogous cases arising under Compensation Acts proves instructive upon the issues involved. In Fumiciello's Case, 219 Mass. 488, 107 N. E. 349, the material facts tended to show that an employee, while returning home at the close of the day's work, entered upon a railroad track which he had to cross after leaving his employer's premises and there was struck by a train and killed. The court, in affirming the denial of compensation, said:

"It is plain that, if * * * it was necessary for him to pass over the railroad location, it formed no part of the employer's plant. * * * The contract of employment did not provide for transportation, or that the employee should be paid for the time taken in going and returning to his place of employment, and when the day's work had ended the employee was free to do as he pleased. If he had chosen to use the public ways, and had been injured by a defect or passing vehicle, the administrator could not recover against the employer, because there would be no causal connection between the conditions of employment and the injuries suffered. * * * The principle is the same and equally applicable where the employee uses a private way or crosses the land of another, either as a licensee or a trespasser."

By way of contrast, and as showing the difference in the rule where the route taken in going home, and on which the injury occurred, was on the employer's premises, see Stacy's Case, 225 Mass. 174, 114 N. E. 206. There the court expressly distinguished the case from Fuimicello's Case on the ground that in the latter the employee was killed upon a railroad track which was not a part of the premises of the employer, while in Stacy's Case the route taken was on the premises.

Likewise, where an employee after work ceased, left the plant, walked about two blocks from the premises, and was killed at a street intersection by a car, he was held not to be entitled to compensation.

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N. K. Fairbank Co. Industrial Commission, 285 Ill. 11, 120 N. E. 457. The court said:

"When work for the day has ended, and the employee has left the premises of the employer to go to his home, the liability of the employer ceases, unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment."

Again in Guastelo v. Mich. Cent. R. R., 194 Mich. 382, 160 N. W. 484, L. R. A. 1917D, 69, plaintiff, after quitting work for the day, left the place where he had been working to go to his bunk car a mile away. There were two routes that he could take; the shorter one being a railroad track, the other a public highway. Plaintiff elected to follow the railroad and at a point about 600 feet down the track was injured by a passing train. The court, in denying compensation, said that it was a well-settled rule "that injuries sustained by an employee while going to or returning from the day's work where there is no contract of transportation are not to be regarded as arising out of or received in the course of his employment." See, to the same effect, Hills v. Blair, 182 Mich. 20, 148 N, W, 243,

Nor can a repairer of musical instruments, who slips on the ice and is injured while going to his work, be held to be injured in the course of his employment. Industrial Commission v. Anderson (Colo.) 169 Pac. 135, L. R. A. 1918F, 885. And a janitor in an office building, who was killed by coming in contact with an electric wire, just as he was leaving his home to go to work, was not in the course of his employment. Murphy v. Ludlum Steel Co., 182 App. Div. 139, 169 N. Y. Supp. 781.

In a case very similar to this—Leite v. Paraffine Paint Co., 2 Cal. Ind. Acc. Com. 948—compensation was denied where it appeared that applicant's husband, while going to work, was killed by a train on the tracks of a railroad which ran in front of the employer's premises; he having taken a short cut across the tracks, instead of walking several blocks to the one street which crossed the railroad and led to the plant.

While these cases are not directly in point they do have a bearing upon the extent of the employer's liability to his employees and show that even under Compensation Acts where an employer may be held for compensation even in the absence of negligence, his responsibility is limited generally to accidents occurrng on the premises. Conceding the duty of a master to provide a reasonably safe means of access to the place of employment one that was reasonably convenient for his men to use, has defendant not fully performed the obligation? Here was a public road, crossing the railroad within reasonable distance of the plant, and adequately guarded. If the place of employment had been isolated completely from any highway, or located so as to be inaccessible, or accessible only by incurring serious risks, the law doubtless would require defendant, in the exercise of a reasonable degree of care, to provide some reasonably safe and convenient means of access for the protection of his employees in going to and from their work, as held in Patrick v, Atlas Knitting Co., 164 App. Div. 753, 149 N. Y. Supp. 845. The case last cited is the only one out of many examined that extended the master's liability beyond the premises owned or controlled by him, for the failure to provide a safe exit therefrom to a public road, and in that case there was no public crossing over the railroad tracks—no means provided for crossing to the public highway, except by trespassing on railroad property. It is interesting to note the history of that case. Upon no trial did plaintiff obtain a judgment. He was thrice plaintiff in error, and was successful only in the volume of the report cited above awarding him a new trial. See 170 App. Div. 943, 154 N. Y.

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Supp. 1136; Patrick v. N. Y. Cent. & H. R. R. Co., 220 N. Y. 728, 116 N. E. 1063.

No such situation existed here as was present in Patrick v. Knitting Co. There according to the opinion, not even one safe means of ingress and egress was provided. Here there was one comparatively safe means of access, but which for his personal convenience deceased did not choose to follow, but instead elected to take another, which was slightly shorter. He made the election with full notice and knowledge of the dangerous character of the course adopted; for he saw, and seeing he must have known, the imminence of the danger, because of the presence of the freight cars on the tracks in front of him. Defendant had fulfilled its duty by providing one reasonably safe and convenient means of access for its employees. Owing no other, it therefore has breached no duty toward deceased and is subject to no liability.

We are therefore of opinion to reverse the judgment, set aside the verdict, and remand the case.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

WILLIAMS

v.

SCHEHL.*

4. MASTER AND SERVANT—WHEN GROCER SELLING MEAT NOT RUNNING SLAUGHTER AND PACKING HOUSE.

The business of a retail grocer who also butchers cattle, sheep and hogs at a slaughter house operated in another place, for sale to his retail customers, and who at his grocery store cuts the meat, makes sausage and renders lard from such animals, for sale in a small way, is not engaged in the business of operating a slaughtr and packing house within the meaning of schedule "n" of section 18 of the Workmen's Compensation Law of this state.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, Packing House; Slaughterhouse.)

5. MASTER AND SERVANT—WHEN RETAIL DEALER RETAINS COMMON-LAW DEFENSES UNDER WORKMEN'S COMPENSATION LAW.

Nor does schedule "x" of said section, nor the general provisions of section 9 of said law, require one conducting such a retail business voluntarily to apply to the Compensation Commissioner to come under said law, or subject him to the penalty of losing his common-law defenses when sued by an employee for injuries sustained due to his alleged negligence in failing to use due care to provide reasonably safe machines and implements or a reasonably safe place for his servants to work.

(For other cases, see. Master and Servant, Dec. Dig. § 361.)

*Decision rendered, Sept. 16, 1919. 100 S. E. Rep. 280. Syllabus by the Court.

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Error to Circuit Court, Brooke County.

Action by Earl C. Williams against John A. Schehl. Verdict and judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and defendant awarded a new trial.

Ramsey & Wilkin; T. S. Riley, of Wheeling, for plaintiff in error.
Erskine Palmer & Curl of Wheeling. for defendant in error.

MILLER, P. The action is ex delicto for the loss of plaintiff's hand, due to the alleged negligence of defendant in furnishing him a defective meat grinder and his failure to furnish him a feeder paddle or other implement necessary safely to operate said machine in the course of his employment.

From the verdict and judgment for plaintiff for one thousand dollars the defendant by writ of error has brought the case here for review.

[1, 2] First, it is complained that the demurrer to the declaration and each of the two counts thereof should have been sustained. We do not find the declaration defective in the first particular pointed out, namely, failure to aver knowledge on the part of defendant of the alleged defective condition of the meat grinder. If necessary to so aver, both counts do charge such knowledge on the part of the defendant.

Secondly it is argued that if defective, the circumstances of the injury show that plaintiff had as much knowledge of the machine as defendant and with such knowledge continued to oprate it ,and thereby contributed to his own injury and excused the defendant . But if, as substantially averred. the defendant's business and the plaintiff's employment fall under the operation of the Workmen's Compensation Law (Code Supp. 1918, c. 15P, §§ 1–55 (secs. 657–711), and defendant failed to comply therewith, contributory negligence constituted no defense to the action. However the declaration avers as to the feeder paddle that plaintiff was in fact ignorant of the defect alleged until he requested defendant to provide him with such implement, which he failed and neglected to do. If plaintiff as alleged was ignorant of the defects in the machine of course he could not be chargeable with contributing to his injuries by continuing to work it. We do not think the circumstances averred sufficiently negative his averment of ignorance as urged by counsel. But as to the feeder paddle the declaration does show knowledge on the part of plaintiff of the alleged need of such an instrument, for he avers that he requested defendant to furnish him with such a paddle, and his promise and failure to do so. But should he not have also averred his reliance on such promise and his belief that defendant would in a reasonable time comply therewith? We are persuaded on authority that such averment should have been made, if plaintiff relied on such negligence as a basis of recovery. Parfitt v. Veneer & Basket Co., 68 W. Va. 438, 449, 450, 69 S. E. 985; Ashley v. Tri-State Lumber Co., 79 W. Va. 726, 91 S. E. 813. If, as these cases hold, a servant continues in the services of his employer after knowledge of the defect in the machinery he is employed to operate he will be presumed to have assumed the risks, when injured thereby. It does not clearly appear whether the verdict and judgment were predicatad on the alleged negligence to furnish a safe meat grinder or the omission to furnish a feeder paddle. If under the evidence the pleadings were sufficient, they might be sustained on either theory.

[3] Lastly, it is urged that the demurrer should have been sustained because the business of defendant without his election to come under it, not averred but negatived, does not bring him involuntarily under the Workmen's Compensation Law. Both counts aver that the business of the defendant in which plaintiff was employed to assist him was that of

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a butcher, and in which he made use of divers pieces of machinery; namely, boilers, engines, motors, pulleys, grinding machines and divers other implements, tools and devices for preparing meats so butchered by him for the market, and more particularly for the grinding of said meat in order to make the same into sausage. But whether the defendant's business so described in the declaration falls within the purview of the Workmen's Compensation Law or not we think on demurrer it would be good as averring a good common-law action for negligence of the defendant to use due care to furnish plaintiff a safe place to work, a good machine to work with, and to keep it in good repair, and that the demurrer was therefore properly overruled. We should for this purpose treat the averments regarding the Workmen's Compensation Law and defendant's alleged negligence in failing to comply therewith as surplusage.

The remaining points relied on involve the giving and refusing of instructions to the jury, and the action of the court on the motion of the defendant for a new trial. All six of the instructions requested by plaintiff were given as offered. Of the four requested by defendant, the first and second were given; 3 and 4 were refused. Defendant complains of plaintiff's instructions 2, 3, 4, 5 and 6, and of the action of the court in refusing his instructions 3 and 4.

[4] Instructions 2, 3 and 4 given for plaintiff all assume that the business of the defendant and his liability to plaintiff were governed by Workmen's Compensation Law and his omission to comply therewith by electing to pay the premiums required thereby, and that he was thereby deprived of his common-law defenses, and particularly that of the contributory negligence of the plaintiff. This theory of these instructions, in the light of the averments of the declaration and the facts disclosed by the evidence as to the nature of the defendant's business, constitutes the chief objection of the defendant thereto. As already observed, the declaration avers that the business of defendant was that of a butcher. The plaintiff himself swears that the business of defendant was that of a general store, "that he had a little of everything—meats and groceries, and flour, and everything." And in describing his employment he says:

"I got up in the morning, and done my work up at the slaughter house, worked about half an hour; then I came in to the store, and went out and solicited orders and worked around the store, and then in the afternoon they sent me down in the basement to grind meats, and cook meats, and that is when I got my hand taken off."

Defendant says his business was that of "meats and groceries," and that the duties of plaintiff were "delivering and taking orders in the forenoon, and in the afternoon taking care of the meat end, such as making sausage, or whatever we were doing; in the store he clerked—received and charged—had full sway, the same as I have or any of the balance of the help." And in describing the circumstances of the accident he says, "He was rendering lard and making this sausage; it was not a large amount—only a small amount—probably fifty pounds;" that to make fifty pounds of sausage on the style of machine used would take probably not more than twenty minutes, even when grinding it a second time.

The question is thus presented, whether the business of "butcher" as alleged in the declaration, or that of a general store in which his business was that of selling meats and groceries at retail with the incidental business of making sausage and rendering lard in the small way described in the evidence, brought the defendant under the involuntary requirements of the statute so as to render him liable to the plaintiff and the penalties imposed thereby, and the loss of his common-law defenses as assumed in these instructions. The contention of plaintiff is that the business of defendant brought him within sub-section "n" of section 18

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of the act (sec. 674), classifying the industries subject to the act; and if not under that section, then it was comprehended within the provisions of sub-section "x," providing that:

"Any industry or business not specified in the foregoing schedules, for which any employer shall voluntarily apply to the commissioner to be brought under the provisions of this act; and the commissioner shall have the authority to classify and place in one of he schedules aforesaid, or any schedule created by him as hereinafter mentioned, any industry or business subject to this act not hereinbefore specifically mentioned."

And if not comprehended thereby, the further contention is that it is covered by section 9 (sec. 665) of said act, providing that:

"All persons, firms, associations and corporations regularly employing other persons for profit, or for the purpose of carrying on any form of industry or business in this state (casual employment excepted)," etc., and not falling within the business of employers "in domestic and agricultural service," specifically excepted by the act.

The first inquiry then is, does the business of *butcher* alleged, or that of selling *meats and groceries* in a small retail store, such as the evidence discloses in this case, though the meats sold are in whole or in part of animals slaughtered by such retail merchant, fall within schedule "n" of section 18, namely, "slaughter and packing houses, stock yards, soap, tallow, lard and grease manufactories, tanneries, * * * in which power driven machinery is used"? In our opinion such a business does not come within the provisions of this section. If so, then every little merchant who happens to butcher a few animals whose meat he cuts and retails to his customers in a grocery store, of which there are many, would be brought under the act. Perhaps, as counsel argue, the size of the business ought not to be regarded as controlling in the construction of the statute. A statute like this in derogation of the common law, and imposing restrictions upon common occupations of the people, should receive a strict construction. Rhodes v. Coal Co., 79 W. Va. 71, 90 S. E. 796, point 3 of the syllabus. Unless therefore the words of the statute strictly construed comprehend the business of defendant, it should by no strained construction be held to include it. The words "slaughter and packing houses" readily suggest a business where animals fit for food are slaughtered and their meats packed and prepared for market in considerable quantities, and in which power driven machinery is employed. Would anyone think for a moment that the Legislature by these words meant to include thereunder the business of a corner grocery where the owner does a retail business in meats and groceries and slaughters a few animals and cuts them up and sells their meats at retail in a small way? We do not think so. Strictly speaking the words "slaughter house" may include any place where animals are killed; there is no pretense that the defendant was engaged in packing meats or other products. The proof is that his manufacture of lard and sausage was for the daily sale thereof to his customers in small quantities. When we examine the various schedules in section 18, we find that they relate generally to the business of mining, manufacturing, railroads, operated or propelled by power driven machinery, telegraph and telephone lines, and construction works of various kinds. In none of them do we find dry goods or grocery stores, banks, fruit stands, jewelry stores, or businesses of like character. Counsel for plaintiff cite us to three cases; one from Georgia, one from Indiana, and the other from Louisana, in support of their construction of the statute. The question in the Georgia case was whether Kehrer, an agent or representative of Nelson Morris & Co., was subject to the occupational tax imposed by the statute upon agents of packing houses doing business in the state. It was decided

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that he was. There is no question made that Morris & Company were large packers in the state of Illinois. They maintained a distributing house in Georgia, where they were represented by Kehrer as agent or salesman. It was held that notwithstanding Morris & Co., did not slaughter and pack meats in Georgia but sold them there through Kehrer, they were doing business as packers in Georgia; that selling meats in Georgia manufactured and packed in Illinois was doing the business of packers in Georgia; and that Kehrer was subject to the occupational tax. Stewart v. Kehrer, 115 Ga. 184, 41 S. E. 680. The Indiana case was an indictment for burning a mill, described as a mill-house, and upon a motion to quash, the question was whether mill-house was sufficiently decriptive of the offense prescribed by the statute. It was held that it was. The court said:

"There are slaughter-houses, packing-houses, smoke-houses, etc., indicating houses in which animals are slaughtered, meats packed and smoked, etc. So a 'mill-house,' we think, would readily be understood to be a building or house used for milling purposes." Ford v. State, 112 Ind. 373, 14 N. E. 241, citing Dugle v. State, 100 Ind. 259.

In the Louisiana case the question was whether the defendant was subject to a license tax for "carrying on the business of a slaughter house" imposed by the statute. The evidence showed that he killed one or two beeves a week, which were raised or pastured on his plantation and sold in his plantation store for which he paid a license as retail merchant and liquor dealer on the public road, and that most of the beeves were purchased originally in New Orleans. The manifest purpose of the statute was revenue, and we think the court rightly held the defendant liable for the tax regardless of the size of his business. Thibaut, Sheriff, v. Hebert 45 La. Ann. 838, 12 South. 931. But our statute must be construed with reference to the legislative intent as manifested by the entire enactment. In two or more of the schedules of section 18 some businesses are exempted. For example, those specified in schedule "m" are limited to factories in which power driven machinery is used; and schedule "v," which includes structural work on buildings, is limited to those over three stories high.

In further support of their proposition counsel for plaintiff rely on the expression of this court in Louis v. Smith-McCormick Construction Co., 80 W. Va. 159, 92 S. E. 249, and Adkins v. Hope Engineering & Supply Co., 81 W. Va. 449, 94 S. E. 506, respecting the broad and inclusive scope of section 9 (sec. 665) of the act. While in these cases reference is made to the wide scope of this section, the business of the defendant in the first case clearly fell within schedules "v" and "w" of section 18; and in the latter case no question was made as to the fact that defendant's business, that of constructing a gas line, was covered by one of the schedules of said section. The principal question was whether on the facts plaintiff was entitled to recover for personal injuries sustained by his infant son fifteen years of age employed by defendant, and whether said infant was an employe as defined by said section 9. The court said that section makes no distinction as to age limit. What was said by the court in these cases should be construed with reference to the questions involved and so as not to do violence to the legislative intent manifested in the enactment.

[5] But what effect should be given to schedule "x", read in connection with said section 9? Clearly this schedule, which is made to cover "any industry or business not specified in the foregoing schedules, for which any employer shall voluntarily apply to the commissioner to be brought under the provisions of this act," does not bring such omitted industry or business under the act without the voluntary application of the employer. To be brought under the act such employer must apply to the commissioner, who must give him a classification and rate of pre-

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mium, unless, the commissioner, as he possibly may do under a subsequent provision of the schedule, himself bring such employer under the act by exercising the power thereby conferred. In these provisions the statute clearly recognizes the two classes; namely, first, those brought under the act involuntarily as it were by being named in the several schedules, and required to comply therewith upon pain of being denied their common-law defenses; and second, those submitting themselves voluntarily, and when so doing, all are subject to the act within the meaning of section 9; but the voluntary classes without such submission, or the special act of the commissioner, do not become subject to the act. Nor is such voluntary class of employers denied any of their common-law rights for neglecting voluntary submission to the statute. Analogous to the case presented here, is that of Barnett, Adm'r, v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150, where we held that section 26 (sec. 682) of the statute (Code 1913, c. 15P) did not operate to deprive employers engaged in both intra-state and inter-state businesses, unless and until, from the time they had elected, as they might under section 52 (sec. 708) by the method prescribed, to come under the act. This notwithstanding the broad and comprehensive scope of section 9.

[6] Our conclusion, therefore, is that plaintiff's instructions 2, 3, 4 and 6, ignoring and excluding defendant's theory of contributory negligence, and holding him subject to the Workmen's Compensation Law, were erroneous and should have been rejected.

Plaintiff's instruction No. 5, we think states the law correctly relative to the liability of the master for failing to comply with his promise to remedy dangerous and defective machinery and to provide a reasonably safe place to work; but as we have already observed, the declaration was defective in not averring reliance of the plaintiff on the defendant's promises and his failure to comply therewith in a reasonable time.

[7] Defendant's instruction No. 3 was, we think, rightly refused. It would have told the jury that if they believed from the evidence plaintiff was a general clerk in defendant's store and performing his duties set forth in the dclaration, and as such clerk had access to and right to use the feeders or feeder paddles in said stores as are named in the declaration and could have taken and used the same in the performance of his duties, and did not do so at the time of the accident, the jury should find for the defendant. The principal vice of this proposition is that it assumes the fact that there were in the store feeder paddles suitable for such use, or any feeder paddles, facts as to which there was little if any appreciable evidence offered by defendant, and facts which were denied by plaintiff. Whether the defendant was negligent in failing to furnish such an instrument, if one was not provided, or were in the store at the disposal of plaintiff, were questions which might properly have been submitted to the jury by a proper instruction. But the instruction in question was not competent in this respect.

[8] Defendant's instruction No. 4, we think, states a correct legal proposition applicable to his theory of the case. It would have told the jury that if they believed from the evidence that plaintiff knew there was a rapidly revolving screw at the edge of the lower hopper of the sausage grinding machine testified to in the case, and that his hand was likely to come in contact therewith in attempting to push meat down into the hopper, he must be held to have appreciated the danger and assumed the risk in attempting to do the work. Louis v. Smith-McCormick Construction Co., supra; Ashton v. Boston & Maine R. R. Co., 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281. The objection of the plaintiff and the ruling of the court thereon are that the instruction ignores the plaintiff's theory of a defective machine and failure to provide a suitable instrument to operate it as the cause of the injury. This would be a good objection if the instruction was a binding one telling the jury to find for the defendant; but it does not do so. It states a correct le-

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gal proposition on defendant's theory as to the facts, and was proper to go to the jury.

For the foregoing reasons, the judgment below must be reversed, the verdict set aside, and the defendant awarded a new trial.

SUPREME COURT OF WISCONSIN.

GEORGIA CASUALTY CO.

v.

AMERICAN MILLING CO.*

5. ADMIRALTY—JURISDICTION—SAVING OF COMMON-LAW REMEDY—WORKMEN'S COMPENSATION.

Workmen's compensation laws provide remedies wholly unknown to the common law, which are incapable of enforcement by the ordinary process of any court, and are not saved to suitors by the saving clause of Judiciary Act Sept. 24, 1789, § 8 (U. S. Comp. St. § 1234), or Judicial Code, §§ 24 (3), 256 (U. S. Comp. St. §§ 991 [3], 1233), relating to admiralty jurisdiction.

(For other cases, see Admiralty, Dec. Dig. § 2.)

6. ADMIRALTY — MARITIME INJURIES — JURISDICTION OF STATE COURTS.

The common-law jurisdiction of the state courts over torts committed at sea is preserved by Judiciary Act Sept. 24, 1789, § 8 (U. S. Comp. St. § 1234), or Judicial Code, §§ 24 (3), 256 (U. S. Comp. St. §§ 991 [3], 1233), but remedies by proceedings in rem can only be administered in the admiralty courts.

(For other cases, see Admiralty, Dec. Dig. § 2.)

Appeal from Circuit Court, Douglas County; Frank A. Ross, Judge.

Action by the Georgia Casualty Company against the American Milling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action brought by the plaintiff, as assignee of one Elmer Emerson, for personal injuries suffered by said Emerson as the result of the alleged negligence of the defendant company July 30, 1916. The facts are not materially in dispute. Emerson was a stevedore in the employ of the Duffy Stevedore Company, a copartnership, and was seriously injured during the unloading of the steamer La Salle, while that steamer was lying at the dock adjoining the defendant's elevator in the harbor at Superior.

The cargo was a cargo of screenings owned by Minneapolis parties, and it was being elevated into the elevator building for storage. The method was this: An adjustable spout, called a marine leg, was let down from the side of the elevator into the hold of the boat, in which operated an endless belt, equipped with buckets, which carried the grain up the leg into the elevator. For a time the buckets needed no assis-

*Decision rendered, April 29, 1919. 172 N. W.. Rep. 148.

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tance from stevedores, the grain running by gravity into the buckets; but as the work went on, and the grain was taken out, so that it slanted away from the end of the marine leg at an angle of about 45 degrees, assistance by stevedores became necessary first by hand shovels, and later. as the grain retreated further, by so-called power shovels or scrapers, which hauled the grain to the foot of the marine leg. The power shovel was operated by a steel cable attached to it and running to a drum on a shaft revolving rapidly and constantly on the outside of the elevator about 18 feet above the dock, which shaft was impelled by an electric motor inside the elevator. The drum revolved only when a clutch was engaged by friction with the drum, and the clutch operated only when a rope attached to a lever was pulled by an employee of the defendant standing on the deck of the boat, who pulled it when it was desired to draw the shovel or scraper full of grain towards the foot of the leg. It is undisputed that in order to keep the clutch in operation that operator must continue to pull on his rope; otherwise, the clutch at once becomes disengaged and the drum ceases to operate.

The work of the stevedores, when the power shovel was in use, was to take hold of the handles of the shovel, pull it back from the leg, as the steel rope unwound from the drum, let it fill with grain, and then, as the rope was pulled and the clutch engaged, follow the shovel to the foot of the leg, dump it, and repeat the operation. The employee of the defendant operating the rope to the clutch could see the stevedores much of the time through the open hatch, and knew when they were ready to have the rope pulled, and under such circumstances would pull it without signal. When, however, the men took the shovel so far from the hatch as to be out of sight, they would give a signal by hollering "All right" to the rope man. At the time of the accident, Emerson and another stevedore had just got up to the leg with a full shovel and dumped it, and had taken hold of the handles and turned around, dragging the shovel back, walking on the screenings. They had gone two or three steps, when the clutch engaged, the shovel was jerked out of the hands of the stevedores, and Emerson fell and his foot was caught by the buckets on the endless belt in the leg, causing serious injuries. The owners of the grain had made separate contracts with the defendant company and with the stevedore company; the defendant company contracted to store the grain, and furnish the marine leg, shovel and power to operate them, and also the rope tender, and the stevedore company contracted to take charge of the appliances in the hold of the vessel and furnish the necessary men to operate them and get the grain to the foot of the marine leg.

Both the stevedore company and Emerson had elected to come under the provisions of the Wisconsin Workmen's Compensation Act (Laws 1911, c. 50), and Emerson filed a claim for his injury under the act which was allowed and paid in due course, whereupon Emerson assigned his cause of action against the defendant to his employer, the stevedore company, which in turn assigned it to the plaintiff company which had insured the risk and paid the award.

The jury returned a special verdict finding (1) that there was no want of ordinary care with regard to the condition of the machinery, (2) that there was want of ordinary care in the operation of the machinery which pulled the shovel, (3) which want of ordinary care was the proximate cause of Emerson's inj ury, and (4) that the damages suffered by Emerson were $1,102.10. From judgment for the plaintiff on this verdict, the defendant appeals.

W. M. Steele, of Superior (Butler, Lamb, Foster & Pope and H. E. Kelly, all of Chicago, Ill., of counsel), for appellant.

Luse, Powell & Luse, of Superior, for respondent.

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WINSLOW, C. J. (after stating the facts as above). The defendant's chief contention in the case is that the trial court had no jurisdiction for the reason that the cause of action is maritime in its nature and within the sole jurisdiction of the admiralty courts of the United States. Two lesser contentions are made, however, which will be first briefly considered.

[1] It is said that the ropetender and Emerson were, as matter of law, fellow servants, and hence that there can be no recovery because the negligence found (i. e., the pulling of the rope by the ropetender at the wrong time) was the negligence of a fellow servant. The contention must fail. Emerson and the ropetender were employed and paid by different masters. True, both masters were engaged in the same enterprise, namely, the unloading of the vessel, but this is not sufficient. There must be identity of control; here the servants of neither master were under control of the other, and this is the ultimate test. 26 Cyc. 1284; 18 R. C. L. § 226, p. 762; Phillips v. C., M. & St. P. R. R. Co., 64 Wis. 475, 25 N. W. 544; Hoveland v. N. B. Works, 134 Wis. 342, 114 N. W. 795, 14 L. R. A. (N. S.) 1254; Johnson v. Motor Co., 173 Mich. 277, 139 N. W' 30, 44 L. R. A. (N. S.) 830; Wagner v. B. E. Ry. Co., 188 Mass. 437, 74 N. E. 919; Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

[2] In his charge to the jury the trial judge applied the doctrine of res ipsa loquitur, and told the jury in substance that where both the apparatus and its operation are in the control of the defendant, and an accident happens which could not ordinarily happen except by reason of defective apparatus or negligent operation, the fact of the accident might be sufficient of itself to justify a finding of defect in the apparatus or negligence in its operation. We see no error here. It is undisputed that the defendant had control of the apparatus and its operation, and it is also undisputed that the apparatus worked abnormally, and operated when it should not operate, thereby causing Emerson's injury. Nothing more is needed to make the rule applicable to the case. Cummings v. N. F. Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Klitzke v. Webb, 120 Wis. 254, 97 N. W. 901. Under the undisputed evidence we are unable to see how the jury could reach any other conclusion, except that the ropetender negligently pulled the rope when it should not have been pulled.

We pass, now, to the question of jurisdiction. No attempt will be here made to review the decisions of the federal courts on the general subject of the jurisdiction of the District Courts of the United States over torts occurring on shipboard. The harmony between them is certainly not complete, and no good purpose would be subserved by lengthy discussion. A learned and very complete note collecting the authorities is to be found appended to the case of C. T. R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 28 Sup. Ct. 414, 13 Ann. Cas. 1215.

The principles which govern the present case are not numerous, nor do we think they are seriously in doubt.

[3] Admiralty jurisdiction is vested exclusively in the United States District Courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Judiciary Act 1789 (Act Sept. 24, 1789, c. 20) § 8, 1 Stat. 76 (U. S. Comp. St. § 1234); Judicial Code (Act March 3, 1911, c. 231) §§ 24(3), and 256, 36 Stat. 1091, 1160 (U. S. Comp. St. §§ 991[3], 1233).

[4] The work of a stevedore in loading or unloading a ship lying at the wharf is maritime service, and actionable injuries received during such work are so far maritime injuries that recovey may be had for them in the admiralty courts by libel in personam against the stevedore company which employs him. Atlantic Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

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[5] Workmen's compensation laws provide remedies wholly unknown to the common law, which are incapable of enforcement by the ordinary processes of any court, and are not saved to suitors by the saving clause of the Judiciary Act above cited. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

[6] The common-law jurisdiction of the state courts over torts committed at sea is preserved by the clause cited, but remedies by proceedings in rem can only be administered in the admiralty courts. Steamboat Co. v. Chase, 16 Wall. 572, 24 Sup. Ct. 843, 48 L. Ed. 307; Sherlock v. Alling, 93 U. S. 118, 28 L. Ed. 819; The Hamilton, 207 U. S. 398, 404, 28 Sup. Ct. 133, 52 L. Ed. 264; McDonald v. Mallory, 77 N. Y. 546; Thompson v. Hermann, 47 Wis. 602, 3 N. W. 579, 32 Am. Rep. 784.

[7] If no remedy is sought against the vessel itself, the case is not within the exclusive jurisdiction of the federal courts but the state courts, administering common-law remedies, have concurrent jurisdiction. 1 Cyc. p. 811, subd. 2; 1 C. J. p. 1253, § 24. Full consequential damages may be recovered in such an action according to the statute of common law of the state which has jurisdiction. Steamboat Co. v. Chase, supra; Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480. The case last cited is closely analogous in its facts to the case before us, and seems well-nigh conclusive on the questions involved. Even though the action be brought in the maritime court, it seems that full damages may be recovered in such a case as the one before us. Imbrovek v. Hamburg Am. S. P. Co. (D. C.) 190 Fed. 231. In case of injury to a seaman on the high seas, the measure of recovery is limited to wages, maintenance and cure (Chelentes v. Luckenback S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; but this is an ancient rule of maritime law, applying only to seamen on a voyage. (The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760). We find no prejudicial errors in the record.

Judgment affirmed.

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Janitor killed while attempting to obtain clean gasoline to clean floors was within act—that he was disobeying an order to use dirty gasoline has no bearing on question whether injury arose in course of employment but only on question of wilful misconduct. Nordyke & Marmon Co. v. Swift (Ind.) 179
Where quarryman breaking rocks died of hemorrhage, held facts as stated indicated injury by accident and injury arising out of employment. Gilliland v. Ash Grove Lime & Port. Cement Co. (Kan.) 187
Where cook on boat was drowned while returning with purchased provisions, part of duty, death arose out of employment to justify award. West man's Case (Me.) 213
Where salesman hurrying to catch train with heavy grips broke blood vessel, injury was result of "accident." Crosby v. Thorp-Hawley Co. (Mich.) .. 245
Contraction of glanders through inhalation of bacteria resulting in death of stableman was not accidental injury arising out of employment. Richardson v. Greenberg (N. Y.) 433
If one employee assaults another in revenge, injury results from voluntary act of assailant not within employment, but when employee is assaulted while defending employer or employer's interests, or incidental to some duty of employment, injuries arise out of employment. Marshall v. Baker-Vawter Co. (Mich.) 399
Personal injuries due to attack by employee of equal rank, following quarrel, cannot be made basis for compensation. Metropol. Redwood Lumber Co. v. Industrial Acc. Comm. (Cal.) 472
Where salesman, required by duties to go from place to place in city, slipped and injured leg on street, he must be considered to have been performing services incidental to employment and not ordinary street risk. Schroeder & Daly Co. v. Indust. Comm. of Wis. (Wis.) 576
Where employee died in course of employment from rupture of aorta, caused by extra effort in vomiting, claimant, irrespective of anterior causes, was entitled to compensation. Clark v. Lehigh Valley Coal Co. (Pa.) 747

§ 374. —— INJURY AS PROXIMATE CAUSE OF DEATH.

Where injury caused abscess necessitating weakening of leg bone which gave way when employee rose from bed, requiring fatal operation, death was result of injury. G. H. Hammond Co. v. Industrial Commission (Ill.) 176
While there must be some casual relation between employment and injury, it is not necessary that injury be one which ought to have been forseen. Baum v. Industrial Comm. (Ill.) 357

§ 375. —— SCOPE OF EMPLOYMENT.

Mine watchman's death caused by blasting stumps to obtain fuel for cabin furnished by employer held due to accident arising "out of and in course of employment." Ocean Acc. & Guar. Corp. v. Pallaro. (Colo.) 15

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(1). In general.

Where school janitor fell while trimming tree in school yard, death did not arise out of or in the course of employment. Compton v. Industrial Commission. (Ills.) 22

Injury occurs in course of employment when within period of employment at place where employee may reasonably be, and while reasonably fulfilling duties of employment or doing something incidental to it. Where employee cleaning gravel on car, remained on car while being switched and fell, injury was sustained in due course of and arose out of employment. Granite Sand & Gravel Co. v. Willoughby. (Ind.) 53

Where employee was killed while conveying workmen at direction of employer, an accustomed duty, death arose out of employment—employer estopped from claiming employee was acting for private benefit of individual member of firm. Rogers v. Rogers (Ind.) 58

Where teamster left wagon to recover receipts pertaining to his work, blown off while in his hat, and was fatally injured by automobile, injury arose out of employment. Keaney's Case—In re T. Libby & Co.—In re Travelers' Ins. Co. (Mass.) 103

Cook on boat, drowned while returning with purchased provisions, part of duty, held injured in course of employment. Westman's Case (Me.) .. 213

Under facts as stated, held accident arose out of employment. Morris & Co. v. Cushing (Neb.) 263

Where employee entered office at foreman's invitation to view, found revolver and was killed by accidental discharge of same, neither foreman nor deceased was acting in employer's interest within act. Culhane v. Economical Garage (N. Y.) 276

Employee's employment may continue for interval after he had ceased working; question where liability of employer ceases in each case to be determined by facts. American Indemnity Co. (Tex.) 294

Employee, injured in attempting to prevent child from being run over on company's premises by automobile driven by officer, on company's business, was injured in course of employment. Ocean Acc. & Guar. Corp. v. Indust. Acc. Corp. (Cal.) 477

Park workman, killed by lightning while under tree waiting to resume work held injured in course of employment. Chiulla de Luca v. Board of Park Com'rs, City of Hartford (Conn.) 595

Excavating work under wall for purpose of building pier is not "mason or concrete work" and act did not apply prior to amendment where servant of one engaged in "mason, concrete work," etc., was injured while making such excavation. Morris v. Muldoon (N. Y.) 623

(2). Injury received while going to or from work.

Petition alleging deceased had left for day and was a short distance from plant when killed was demurrable because it showed injury not sustained in course of employment—such injuries did not occur while in furtherance of affairs of employer. American Indemn. Co. v. Dinkins (Tex.) 294

If employee is injured while in performance of any of his duties, injury arises out of employment. Heinze v. Industrial Comm. (Ill.) 361

Where employee voluntarily performs act in emergency, believing it in interest of employer, and is injured, he is not acting beyond scope of employment—where employee was fatally wounded by strikers while trying to save employer and other employees, injury arose out of employment. Baum v. Industrial Comm. (Ill.) 357

Employee who has arrived at place of employment for purpose of commencing work is performing service incidental to work—accident to employee on way to work in use of necessary mode to ingress to work, provided and required by employer, arose out of employment. Judson Mfg. Co. v. Industrial Acc. Comm. (Cal.) 687

§ 376. —— NATURE OF INJURY.

(2). Disease in general.

Compensation may be awarded, despite pre-existing disease, if aggravated and accelerated by accidental injury which is immediate or proximate cause of death—where employee was found dead near his machine, but no evidence that his heavy work hastened death by disease, there could be no recovery. Jakub v. Industrial Commission (Ill.) 153

It is sufficient to justify award, if accident, by weakening resistance or otherwise, influence existing disease to cause death or disability. Mallman v. Record Foundry & Machine Co. (Me.) 205

Ohio state act has no application in case of employee blinded by glittering surfaces which he inspected—an occupational disease. Zajkowski v. American Steel & Wire Co. (U. S.) 579

If death occurs during course of employment in ordinary way natural to progress of employee's disease, there can be no recovery, but if death results from injury due to accident in course of employment, fact of employee's chronic ailment, rendering more susceptible to such injury, will not defeat right to compensation. Clark v. Lehigh Valley Coal Co. (Pa.) 747

§ 378. —— IN GENERAL.

That employee was negligent in use of explosives while blasting in course of employment is no defense. Ocean Acc. & Guar. Corp. v. Pellaro. (Colo.) 15

§ 380. —— WILLFUL MISCONDUCT OF EMPLOYEE IN GENERAL.

Where blasted stumps were customary and cheapest fuel, and mine watchman,

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required to obtain own fuel, not forbidden to use explosives, was killed in so doing, he was not guilty of recklessness amounting to willful misconduct Ocean Acc. & Guar. Corp. v. Pallaro. (Colo.) 15
Where employer acquiesced in violation of order, it was nullified and employee was not guilty of wilful misconduct. Nordyke & Marmon Co. v. Swift (Ind.) 179
Pressman catching at falling cards, resulting in injury to hand, although warned against, was not guilty of wilful misconduct. Hyman Bros. Box & Label Co. v. Industrial Acc. Comm. (Cal.) 343
Where minor employee wiped grease from running machine, despite warning sign, and was so injured, act was not wilful disobedience. Western Pac. Ry. Co. v. Industrial Acc. Comm. (Cal.) 348
Where evidence established it was deceased's duty to run elevator, that condition of elevator was not such as to require repairs, contention that deceased, killed while investigating elevator rope out of order, was guilty of wilful misconduct and that accident did not arise out of employment, will be overruled. Rowe v. Leonard Warehouses, Inc. (Mich.) .. 393
Machinist helper's omission to wear goggles while at dangerous work, contrary to rules and specific instructions, merely because he disliked the goggles, was "serious and wilful misconduct," McAdoo v. Indust. Acc. Comm. (Cal.) 469
Laborer, killed attempting to ride on employer's truck going in direction of his work held not guilty of willful misconduct. Fiarenzo v. Richards Co. (Conn.) 599

§ 382. —— SATISFACTION OR RELEASE.

Written contract between employer and dependent widow of deceased in compliance with statute, which was performed for a time, was a settlement though not mentioning whether parties were engaged in interstate commerce. Employers misconception of whether liable under state or federal statute, or ignorance of the law, was not such mistake as to authorize setting aside partially performed settlement under state law—where insurer stopped payment on such settlement because of claim that deceased was engaged in interstate commerce, it was estopped to assert injury did not arise out of employment. Bach v. Interurban Ry. Co. (Ia.) 63
Under act, authorizing award if not settled by agreement, a settlement made without fraud after injury is binding. Jenkins v. Texas Employers' Ins. Ass'n. (Tex.) 148
Employer cannot complain of agreement for compensation approved by board because it made no provision for payment during partial disability in course of recovery—agreement for compensation between employee, employer and insurance carrier, knowing all details, pursuant to act, is admission of liability, when approved by board has force and effect of award. Home Packing & Ice Co. v. Cahill (Ind.) 184
Mother, by accepting settlement as administratrix of estate or as individual for all claims against company, whose negligence caused son's death, did not thereby release his employer from liability, the employer being free to proceed against negligent company. Naert v. Western Union Tel. Co. (Mich.) 231
Obligation assumed by insurer under act and policy, no broader than act, held to indemnify employer against liability imposed on him by act and nothing else. Kratz v. Holland Inn (Iowa.) 487
Agreement between insurer and widows of diseased employees by which insurer agrees to pay compensation under act is not admission of common law or statutory liability, and amount agreed to be paid is not adjustment of claim on causes outside act. Sterling v. London Guar. & Acc. Co. (Mass.) 610
Settlement made by workman with employer and insurer on assumption only one eye was lost, and release executed, does not bar from thereafter claiming for injury to other eye. Zinken v. Melrose Granite Co. (Minn.) 614

§ 383. ACCIDENT OR INSURANCE FUNDS, AND CONTRIBUTIONS THERETO.

Discretion of commission, giving employer consent to self-insure to require deposit of bonds or securities, is not limited to case where there is doubt at time of employer's ability—requirement to deposit $20,000 in bonds held not an abuse of discretion. Bank of Los Banos v. Indust. Acc. Comm. (Cal.) 587
Act does not preserve right of action existing in favor of injured employee who would otherwise fall within act against employer who fails to pay into accident fund amount it would be required to contribute because employee was within act. Gowey v. Seattle Lighting Co. (Wash.) 752

(B) COMPENSATION.

§ 385. —— DISABILITY BENEFITS.

(1). In general.

Where injury caused temporary total disability and evidence indicates permanent partial disability, employee is entitled to award for entire period not exceeding 300 weeks, less number of weeks for which compensation already received. Mack v. Legeal (La.) 202
In case of injury to minor employee, act justifies compensation on basis of probable wage at 21, not after. Western Pac. Ry. Co. v. Industrial Acc. Comm. (Cal.) 348
Commission computing compensation of injured minor employee should use

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basis of probable wages "at" twenty-one, not those long "after" majority. Hyman Bros. Box. & Label Co. v. Industrial Acc. Comm. (Cal.)..... 348
Tips received by Pullman car porter are understood by him and company to be part of wages and can be considered in determining compensation for injuries. Bryant v. Pullman Co. (N. Y.)..... 533
Tips received by employee are part of remuneration to be considered in determining "average weekly earnings." Hartford Acc. & Indemn. Co. v. Industrial Acc. Comm. (Cal.) 593

(2). —— Injury to arm, hand, or finger.
In awarding compensation for injuries to hand, commission should determine wage earning capacity not actual wages received since accident. In re Behrens (N. Y.) 282

(4). —— Loss of arm, hand, or finger.
Where employee by injury lost four fingers on right hand, commission was authorized to estimate proportionate loss of use of hand. Berman v Reliance Metal Spinning & Stamping Co. (N. Y.) 128
Compensation for injury resulting in loss of use of certain fingers with interference with use of other fingers and hand is not limited to specified compensation for loss of such fingers but may be awarded under "other cases.' In re Behrens (N. Y.)..... 282

(5). Total disability.
Where employee, injured and receiving compensation, worked for another and was injured, resulting in total disability, he is not entitled to receive more than $10 per week, whether paid by one employer or both. O'Brien v. Albert A. Albrecht Co. (Mich.)..... 284
Where injured employee had worked several years where injured, his average weekly wages, not those of others similarly engaged, were proper basis for determining amount of compensation. U. S. Fid. & Guar. Co. v. Davis (Tex.) 310

(6). —— Loss of arm, hand, or finger.
Injured employee's selection of physician other than one of staff maintained by employer was election at own expense. Swift & Co v. Industrial Commission (Ill.) 163

(7). —— Loss of leg or foot.
Where injured employee's leg was amputated after he had received hospital and medical services under act and compensation for total incapacity for 54 weeks, the 125 week period of compensation for loss of leg commenced with date of operation, not of accident. Addison v. W. E. Wood Co. (Mich.)..... 717

(8). Partial disability.
Evidence and finding pertaining to allowance for compensation for injuries, examined and no error discerned. Jacobs v. Hamilton Coal & Merc. Co. (Kan.) 496

(11). Permanent disability—Loss of or injury to eye.
Permanent loss of use of organ is equivalent to loss of organ itself. Phonville v. N. Y. & Cuba S. S. Co. (N. Y.)..... 270
Injury to employee which resulted in loss of one testicle held a "permanent injury," Hercules Powder Co. v. Morris Co. Ct. of Common Pleas (N. J.). 525
Workman was not entitled to recover, for injuries classified as permanent partial disabilities, awards aggregating more than the maximum provided for permanent partial disability, although received at different times, where combined injuries did not come within classification of permanent total disabilities. Biglan v. Indust. Ins. Comm. (Wash.).. 650
Claimant is not deprived of all compensation for refusal to accept medical services from employer and employment of other physician, but only of compensation for injury or increase of incapacity caused by refusal. Neary v. Phila. & Read'g Coal & Iron Co. (Pa.)..... 642

(11¼).
Where one eye was injured to half of seeing ability and thereafter both eyes were injured so that workman could not longer follow occupation, held he is entitled to permanent partial disability compensation. Zinken v. Melrose Granite Co. (Minn.)..... 614

(12). —— Loss of arm, hand, or finger.
Employee who has lost three-fourths of right hand is entitled to full compensation for three-fourths of time, not three-fourths of compensation for full time. Phonville v. N. Y. & Cuba S. S. Co. (N. Y.)..... 270
Despite prohibition that award for more than one finger exceed amount for loss of hand, one who could not work at occupation by reason of loss of several fingers and laceration of tendons, could obtain compensation beyond limit of 150 weeks provided for loss of hand where disability continued beyond such time. Schimmel v. Detroit Pressed Steel Co. (Mich.). 413

(14). —— Injury to leg or foot.
Injury to leg may justify larger compensation than loss of leg—it was not error to follow this instead of schedule. Close v. Lucky O. K. Mining Co. (Kan.) 492

(17). Deductions or set-offs, and duty of claimant to reduce loss.
Where deceased was paid regular weekly wages about six months, less deduction for supplies and tools, without objection, refusal to make any deduction therefor in determining wages on ground there was no such express agreement, was reversible error. Reitmyer v. Coxe Bros. & Co. (Pa.) 644

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(18). —— Submission to surgical operation.
Employee who suffered injury resulting in hernia, incurable except by operation and who refused to undergo operation, should not be allowed compensation while persisting in refusal. O'Brien v. Albert A. Albrecht Co. (Mich.) 284
Where arm is so fractured that permanent total disability is created unless amputated, award is not limited to that of loss of arm, as total permanent disability may exist without loss or injury to specific member. Simpson v. N. J. Stone & Tile Co. (N. J.) 425

(30). Commutation of payments and award of gross sum.
Under act, commutation and payment in lump sum by order of district court authorized only in exercise of sound discretion upon an agreement or settlement by parties. Myers v. Armour & Co. (Neb.) 112
Swallowing pins while trimming show window, rendering claimant bedridden and necessitating surgical operation to save life, was "unusual circumstance" warranting commutation of award into lump sum—provision that such commutation be not allowed to satisfy debt, etc., does not defeat where unusual circumstances require such payment to save life. Jensen v. F. W. Woolworth Co. (N. J.) 421

§ 886. —— DEATH BENEFITS.

(1). In general.
Where boy, 16, with partially dependent mother, was killed during first week of last employment, "annual earnings" are ascertained by wages received during preceding 12 calendar months—annual earnings to be ascertained by reference to same factors as "average weekly wages" unless inapplicable under all circumstances. Freeman's Case—In re Automatic Time Stamp Co.—In re Amer. Mut. Liab. Ins. Co. (Mass.) 498

(2). Deductions.
Expenses incurred by parent on account of deceased minor son are pertinent in determining dependency, but irrelevant in ascertaining amount of compensation. Freeman's Case—In re Automatic Time Stamp Co.—In re Amer. Mut. Liab. Ins. Co. (Mass.) 498

(4). Commutation of payments and award of gross sum.
Right to have compensation commuted to lump sum is available only to employer who pays voluntarily, not to one who refuses until adjudged liable in proceedings. G. H. Hammond Co. v. Industrial Commission (Ill.) 176

(5). Apportionment of payments.
Commission was not required to apportion award between widow and child where there was no contest as to who should receive benefit—provision for determination of proportionate share of each beneficiary does not require what proportion every member of the class may receive. Swift & Co. v. Industrial Commission (Ill.) 163
Commission, awarding lump sum to administrator, not required to declare proportion of each beneficiary, such distribution to be made by court appointing administrator. G. H. Hammond Co. v. Industrial Commission (Ill.) 176
Act providing beneficiaries upon death of husband will take by law of descent, means descent relating to community property and not per capita as provided by law of descent relating to separate property. Texas Employers' Ins. Ass'n v Boudreaux (Tex.) 503

§ 888. PERSONS ENTITLED TO COMPENSATION FOR DEATH OF EMPLOYEE (DEPENDENTS).

Under statute, award in proper case to father and mother of deceased employee on ground of dependency, employee having left neither wife nor children, may be sustained. Pifumer v. Rheinstein & Haas, Inc. (N. Y.) .. 136
Dependency of mother justifying award, is personal dependency for support and maintenance, actual and consistent with position in life, not including maintenance of others, or unnecessary contributions—by statute, one partially dependent, whatever the degree, entitled to minimum award Rock Island Bridge & Iron Works v. Industrial Commission. (Ills.) .. 33
Under statute, children of decedent living with him and his unlawful consort were dependents. Piccinim v. Connecticut Light & Power Co. (Ct.) 18
Dependent is one who is sustained by, relies for support upon the aid of, looks for support to, and relies for reasonable necessaries consistent with the dependent's position in life upon another. Rock Island Bridge & Iron Works v. Industrial Commission. (Ills.) 33
Dependency of half brother within act, could not be ruled adversely to him because not made directly to him but to his mother, decedent's stepmother. O'Flynn's Case. (Mass.) 105
Where watchman killed by burglars, left dependent widow who also died before compensation was made and administrator of workman's estate sued, held that action was prosecuted by proper party, that full amount of compensation was recoverable, and that injury causing death arose out of employment. Smith v. Kaw Boiler Works Co. (Kans.) 87
Award made to widow with provision for unpaid balance to surviving children in event of her death, held proper. Zoladtz v. Detroit Auto Spec. Co. (Mich.) 259
Brothers were beneficiaries within act. American Indemn. Co. v. Zyloni (Tex.) 315
Father contributing $12 per week to common fund of $30 for family main-

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tenance, held not dependent upon deceased son contributing only like amount. Klein v. Brooklyn Heights R. Co. (N. Y.) 432
Evidence sustains finding that employee met death in course of employment—children under 16 conclusively presumed dependents and where father had deserted the deceased mother several years before, children are "orphans" for purpose of fixing award. State ex rel Radisson Hotel v. Dist. Court of Hennepin Co. (Minn.) 412
Alien's widow, residing in foreign country, is not entitled to conclusive presumption of dependency, but extent of dependency is question of fact. Perotti's Case (Mass.) 391
To constitute "desertion" creating presumption that surviving spouse is wholly dependent upon decedent unless she wilfully deserted him, there must be cessation of marriage relation, intent to desert, and absence of consent or misconduct of party alleged to have been deserted—where husband is unable to support wife, her separation with his consent to earn wages does not constitute desertion. James Black D. G. Co. v. Iowa Indust. Com'r (Iowa) 379
Woman, who in good faith lived with employee as lawful wife, believing marriage license constituted marriage, held entitled to recover for his death as "dependent." Temescal Rock Co. v. Indust. Acc. Comm. (Cal.). 474
Question of dependency to be determined in accordance with fact at time of injury—parital dependency may be found though dependent might have subsisted without the aid—finding of partial dependency by claimant, mother of deceased employee, boy of 16, cannot be pronounced erroneous in law, where boy after leaving home, promised to send her all earnings except needs for board and clothes and was killed before first pay day, so had no opportunity to remit money. Freeman's Case—In re Automatic Time Stamp Co.—In re Amer. Mut. Liab ia. Co. (Mass.) 498

§ 389. SUBROGATION TO RIGHTS OF INJURED EMPLOYEE.

If workman, injured by negligence of third party, obtains from employer assignment of right to bring action, it may be maintained directly by injured workman against negligent third party. Thomas v. Otis Elevator Co. (Neb.) 114
Where employee is injured in course of employment by actionable negligence of third party, statutory remedy accrues to him or dependents for compensation against employer and common-law remedy against third party, though he cannot proceed against both. If he elects the former, he waives the latter and employer is subrogated. Carlson v. Minneapolis St. Ry. Co. (Minn.) 513
Employer's right to recover amount which he was compelled to pay to employee's dependents from third party, whose act was cause of accident, depends upon whether negligence of third party was proximate cause of injury. Carlson v. Minneapolis St. Ry. Co. (Minn.) 513
In action against electric company by city as subrogee of widow of fireman electrocuted while discharging his duties, defendant cannot set up contributory negligence of city in not condemning wire's location—conventional subrogation made by widow of such employee, authorizing city to sue held valid. City of Shreveport v. Southwestern Gas & Elec. Co. (La.) 605
Compensation paid by insurance carrier to injured employee cannot be recovered by insurer from actual wrongdoer from whom employee recovered full damages before payment of compensation. Southern Surety Co. v. Chicago, St. P., M. & O. Ry. Co. (Iowa) 710

§ 391½. ——

Injured employee could not repudiate and abrogate ruling of board awarding compensation and at the same time treat it as effective and binding upon employer, seeking to hold it liable for lump sum settlement for failure to comply with mandates of board. U. S. Fid. & Guar. Co. v. Davis (Tex.) 310

§ 393. ——TERMINATION OF PAYMENTS.

Compensation awarded partially dependent mother for son's death is not right vested in her and does not pass over to husband as her administrator, though he also was awarded compensation, but ceased with her death. Duffney v. A. F. Morse Lumber Co. (R. I.) 558

§ 393¼. ——

Preference given by act is, in case of insolvent corporation under statute, confined to amount representing weekly award for the two months preceding institution of proceedings in insolvency. Steel & Iron Mongers, Inc. v. Bonnite Insulator Co. (N. J.) 121

§ 394. NATURE AND FORM OF REMEDY.

Procedure under act is governed by practice in equity. Sterling v. London Guar. & Acc. Co. (Mass.) 610
Under treaties with Austria-Hungary, its consul general may direct suit under act on behalf of mother, resident of Austria, for death of son—nonresident alien may maintain action under act for death of son against employer. Garvin v. Western Cooperage Co. (Ore.) 738

§ 395. WHAT LAW GOVERNS.

A longshoreman, injured on a vessel, whose employment is covered by state act which makes the remedy thereunder exclusive, is without remedy

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in admiralty. The Howell (U. S.) 467
One employed to load vessel while moored on navigable waters at dock in port to be transported to another state is engaged in work of maritime nature and if injured while so employed does not come within act—one thus employed, if injured by automobile negligence of employer, is not limited to seamen's relief under admiralty rules, but may recover full damages at common-law—amendment to Federal Code extending rights and remedies under state acts to persons injured while in maritime work will not be given retroactive effect. Soderstrom v. Curry & Whyte, Inc. (Minn.) 516
Remedy under state compensation acts is not exclusive, and federal courts must administer maritime law unaffected by state statutes. Rohde v. Grant Smith Porter Co. (U. S.) 585
Case which by allegation and proof is brought within statute is controlled by that act, although its provisions may not have been referred to in express terms in pleadings. Lusk v. Bandy (Okla.) 726

(C) PROCEEDINGS.

§ 396. JURISDICTION OF COURTS.

Proceedings to determine award for injury in one county, although employee resided in another county and insurer and employer were foreign corporations, would not be transferred to latter county on order to show cause, as change of venue statutes do not apply. State ex rel Nelson v. Dist. Ct. of Wabasha Co. (Minn.) 267
Where carpenters were killed while working in vessel, cases did not come within act and superior court in approving agreements between insurer and widows was without jurisdiction and void. Sterling v. London Guar. & Acc. Co. (Mass.) 610
Servant's personal injuries, occurring not only on navigable waters, but while at work on vessel, constitute maritime tort of which admiralty court has jurisdiction—state act is not exclusive and federal courts must administer maritime law—where servant seeks redress from maritime tort in admiralty court, rights cannot be barred or affected by state statutes. Rohde v. Grant Smith Porter Co. (U. S.) 585
Jurisdiction of board to approve agreement and of superior court to render decree in accordance with such approval, necessarily rests upon assumption and fact that agreement concerns employee under act and that terms of agreement conform to its provisions—superior court cannot give validity to agreement void in inception because not approved by board—full performance of conditions is prerequisite to jurisdiction of superior court which cannot be changed by consent nor waived by acts of estoppel. Sterling v. London Guar. & Acc. Co. (Mass.) 610
Acts provide remedies unknown to common law, incapable of enforcement by ordinary process and not saved to suitors by admiralty statutes—common-law jurisdiction of state courts over torts committed at sea is preserved by statute, but remedies by proceedings in rem can only be administered in admiralty courts. Georgia Cas. Co. v. American Milling Co. (Wis.) 765

§ 397. BOARDS AND COMMISSIONS.

No presumption of jurisdiction in favor of Industrial Commission exercising limited or statutory jurisdiction. Tazewell Coal Co. v. Industral Commission. (Ills.) 41
Agreement between insurer and compensation claimant is not approved unless board's formal approval is legal and within its jurisdiction. Sterling v. London Guar. & Acc. Co. (Mass.) 610

§ 398. NOTICE OF INJURY OR CLAIM, AND DEMAND FOR COMPENSATION.

Verbal notice sufficient. Heed v. Industrial Commission. (Ills.) 27
Where stockholder and director of employer company was near scene of accident, lifted injured employee, helped carry, and sent to hospital, employer had sufficient notice under statute. Joseph Halstead Co. v. Industrial Commission. (Ills.) 24
Statute requires notice within 30 days, this requirement being jurisdictional. Barrett Co. v. Industrial Commission. (Ills.) 43
Claim for compensation must be be unequivocally made within the six months fixed by statute—where board, in concluding that claim for compensation was made, determined that claimant probably did not use term "compensation," but said he wanted pay for injury, award could not be predicated on such guess or probability. Rubin v. Fisher Body Corp'n (Mich.) 242
Where employee did not immediately notify employer of injuries, obtained services of family physician, and was taken to hospital, employer was liable for medical aid received after employer was notified and did not offer to furnish same—in emergency, injured employee is warranted in securing medical service at employer's expense without giving notice—question whether case justifies such action is one of fact. Gage v. Board of Control Pontiac State Hosp. (Mich.) 247
Commission's finding that failure to give notice within time specified did not prejudice employer, or insurance carrier cannot be sustained where no reason was shown why notice could not have been given. Combes v. Geibel—In re State Indust. Comm. (N. Y.) 374

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Brothers, beneficiaries, held to have given required notice and made claim. American Indemn. Co. v. Zyloni (Tex.) 315
Claim against named individuals, copartners, using several styles, is not invalid because made orally to one of them nor because claim states they were doing business under such styles. Heinze v. Industrial Comm. (Ill.). 261
Where employer received immediate notice of accident, kept in touch during last sickness, had actual notice of death, and shortly thereafter discussed compensation with widow, and autopsy would not have shown cause of death, failure to give notice was not prejudicial. Notice to or knowledge of employer of death is notice to and knowledge of insurance carrier. Folts v Robertson (N. Y.) 429
Requirement for notice of claim within six months, or in event of physical or mental incapacity, within six months after its removal construed so that subsequent incapacity during the period will flag statute. Corkin v. River Raisin Paper Co. (Mich.) 411
Employee who does not return to service within six months after injury or cessation of payment, and who does not within such time claim compensation has waived rights thereto—act giving injured employee, who has returned, eighteen months to make claim cannot be construed as applying only to those who remain eighteen months in such employment or as meaning that in case they quit within that time, claims must be filed within six months of date of leaving. Otis Elevator Co. v. Industrial Comm. (Ill.) 364
Proceedings against employer for injury sustained by employee in course of employment cannot be maintained unless claim made within three months after accident. Jacobs v. Hamilton Coal & Merc. Co. (Kan.) 496
Failure to file claim with commission within one year from date of injury leaves commission without jurisdiction, although filed less than year after disability—such failure cannot be disregarded on theory that employer, by continuing injured servant in employment, is estopped to plead that claim is barred. O'Esau v. E. W. Bliss & Co. (N. Y.) 544
Where employer knew all about accident immediately and within thirty days authorized payment of doctor's bill, failure to give written notice within thirty days did not prevent recovery—requirement of written notice within six months after payments have ceased applies only where there is continuation of disability—if, after returning to work, injured employee dies, his beneficiaries are not prevented from asserting claim if filed within eighteen months after return to employment. Bowman v. Industrial Comm. (Ill.) 701

§ 398½. ——

Where employee attempted to settle by agreement and consented to arbitration, but refused to arbitrate before a committee, and employer refused to arbitrate except before such committee, and employee made no proper application for appointment of arbitrator, held that action was maintainable despite such omission. Goodwin v. Cudahy Packing Co. (Kan.) 192

§ 399. MEDICAL EXAMINATION OF CLAIMANT.

Injured woman employee, by refusal to permit injection in kidney for purpose of X-ray photographs does not necessarily forfeit right to compensation. U. S. Fid. & Guar. Co. v. Wickline (Neb.) 613

§ 400. PARTIES.

Injured employee, having received award, may be joined as party plaintiff with employer in suit against party whose tort caused injury—where employer refuses to join in such suit, employee may maintain suit alone making employer one of the defendants. Hall v. Southern Pac. Co. (Cal.) 12
Where watchman killed by burglars, left dependent widow who also died before compensation was made and administrator of workman's estate sued, held that action was prosecuted by proper party, that full amount of compensation was recoverable, and that injury causing death arose out of employment. Smith v. Kaw Boiler Works Co. (Kans.) 87
Administrator of deceased has right to prosecute for and collect award, employer being protected by requirement that administrator is obligated as to distribution. G. H. Hammond Co. v. Industrial Commission (Ill.) .. 176

§ 491. PLEADING.

Complaint alleging common-law liability, showing on its face that employee's employment brought him within act, but omitting to allege employer's failure to provide required insurance, is defective. Ruddy v. Morse Dry Dock & Rep. Co. (N. Y.) 448
Administrators, suing for damages for negligently causing death of intestate under Code, made out prima facie case when they stated cause of action under such statute and were not bound to negative act making remedies under such act exclusive. Basso v. John Clark & Son (N. Y.) 530
Where complaint pleaded under federal act, and proof showed plaintiff not in interstate commerce, but established case under federal statutes covering accidents in intrastate commerce, there was no variance or failure of proof requiring dismissal. Archibald v. Northern Pac. Ry. Co. (Wash.) 662
Reply of injured servant, plaintiff, held to put in issue defendant's allegation he had complied with act—where the injuries were received before act was amended, it was not necessary to allege affirmatively in complaint

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that defendant failed to secure payment where case pleaded did not appear to come within statute. Morris v. Muldoon (N. Y.) 628
Allegations that plaintiff insured one of his employees by policy written under terms of act, held to carry implied allegation that plaintiff was insurance carrier entitled to be subrogated to rights of injured employee against party causing injury. Royal Indem. Co. v. Midland Counties Pub. Serv. Corp. (Cal.) 689
Injured servant's complaint is not insufficient for failure to allege defendant had not elected to come under act. Garvin v. Western Cooperage Co. (Ore.) 738

§ 402. EVIDENCE.

Under undisputed evidence, held court erred in refusing to find injury occurred on one of several roads leading to plant of employer, and that court erred in refusing to find as fact that employee was injured after being relieved for day. Parties who base right of recovery on act must show they are within terms of act. American Indemn. Co. v. Dinkins (Tex.) 294

§ 403. —— PRESUMPTIONS AND BURDEN OF PROOF.

There is no presumption of dependency of parents of deceased 22 years old; hardly presumption that they are living, residence being foreign country Award under act may not be sustained where no evidence of essential fact of dependency. Pifumer v. Rheinstein & Haas. Inc. (N. Y.) 186
Burden is on employee to prove claim was made within six months. Heed v. Industrial Commission. (Ills.) 27
In proceedings under act before commission, claimant has burden of proof. Joseph Halstead Co. v. Industrial Commission (Ills.) 34
Applicant has burden of proof, but evidence sufficient to make reasonable person conclude applicant was injured while performing duties is sufficient. Swift & Co. v. Industrial Commission. (Ills.) 35
Where contractor's employee assists with machine or appliance belonging to contractor, in work of subcontractor or other employer to whom he is lent, he may become, with his consent, servant of other employer, but there is rebuttal presumption that in management of machine he remains servant of general employer. Emach's Case. (Mass.) 94
On hearing before commission, claimant has burden of proof. Mailman v. Record Foundry & Machine Co. (Me.) 205
Burden rests on claimant to prove facts necessary to establish right to compensation, and eidence, though slender, that will satisfy reasonable man is sufficient—to recover, burden is on widow to prove death was caused by accident, arising out of employment, and in course of employment. Westman's Case (Me.) 212
In determining whether death was suicidal or accidental, legal presumptions and amount of circumstantial and direct evidence are to be taken into consideration. Westman's Case (Me.) 212
Burden is upon claimant to show injuries arose out of employment. Marshall v. Baker-Vawter Co. (Mich.) 399
Persons claiming death benefits under act are bound to bring themselves within language of act. Drummond v. Isbell-Porter Co. (N. Y.) 585
In action for compensation for death, burden of establishing claim is upon applicant. Chaudier v. Sterns & Culver Lumber Co. (Mich.) 503
In absence of statement in writing or written notice that provision of section of act were not intended to apply, master and servant are presumed to have accepted and agreed to be bound thereby. Buonfiglio v. Neumann & Co. (N. J.) 521

§ 404. —— ADMISSIBILITY.

Testimony based on personal examination of injury, covering not merely objective symptons but actual inspection, was not incompetent. Heed v. Industrial Commission. (Ills.) 27
Testimony rehearsing story of accident as told by decedent to witnesses was inadmissable hearsay—testimony of decedent's words and gestures when discovered after injury were admissible only as showing his physical condition at the time, as part of res gestæ. Mailman v. Record Foundry & Machine Co. (Me.) 205
Testimony by employer and his wife as to statements of deceased employee is admissible under statute. Perry v. Industrial Acc. Comm. (Cal.) 350
Evidence respecting deceased son's intent to send mother the part of wages remaining after paying board, held admissible as relevant on question of dependency. Freeman's Case—In re Automatic Time Stamp Co.—In re Amer. Mut. Liab. Ins. Co. (Mass.) 498
Deposition of physician as to servant's injuries, although ..earsay as to employer and insurance carrier who were not parties to proceeding in which deposition was taken, is admissible. Ocean Acc. & Guar. Corp. v. Indus. Acc. Comm. (Cal.) 477

§ 405. —— WEIGHT AND SUFFICIENCY.

Evidence held to show that wife of injured employee notified employer. G. H. Hammond Co. v. Industrial Commission (Ill.) 176

(1). In general.

To justify award, greater weight of evidence must be in favor of claimant upon whom is burden of proof. Joseph Halstead Co. v Industrial Commission. (Ills.) 24

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Where only notice given employer was by injured person at a time he estimated one to two months after accident, there was no evidence to find notice was given within 30 days. Barrett Co. v. Industrial Commission. (Ills.) 43
Board is authorized to draw reasonable inferences from established facts and circumstances shown by evidence. Nordyke & Marmon Co. v. Swift. (Ind.) 179
Must be some competent evidence, however slender, to support award; not speculation, surmise or conjecture. Mailman v. Record Foundry & Machine Co. (Me.) 205
Evidence held to sustain board's conclusion that emergency warranted injured employee securing medical aid without first notifying employer. Gage v. Board of Control Pontiac State Hosp. (Mich.) 247
Liability of state insurance fund same as any other insurance carrier and established by like proof. Fischer v. Genessee Const. Co. (N. Y.) 279
Evidence held to sustain findings of board that employee was mentally and physically incapacitated from making claim during more than three months of the six months period for filing claim. Corkin v. River Raisin Paper Co. (Mich.) 411

(2). Relation of parties.

Finding of Board that engineer of crane loaned by contractor did not become servant of subcontractor held supported by evidence. Emach's Case. (Mass.) 94
Where decedent was employed as gatekeeper on highway, held it was not shown that he was casual employee. Doherty v. Grosse Isle Tp. (Mich.). 222
Under evidence, held employer was common carrier of express, but not by steam railway. State ex rel. Gt. North'n Exp. Co. v. Dist. Ct. of Ramsey Co. (Minn.) 262
Evidence showing employer's control of mode of work held to support finding that deceased when killed was not independent contractor—assumed that statutory definition does not distinguish "employee" from "servant" at common law as distinguished from independent contractor. Western Indemnity Co. v. Prater (Tex.) 455
Finding that decedent, leaving premises under orders and returning on personal mission, was still an employee held not against undisputed evidence. American Bridge Co. v. Funck, Indust. Com'r (Iowa) 374

(3). Acceptance or rejection of statute.

Evidence held to show employer filing notice of rejection of act had posted notices in place of business as required by statute. A. T. Willett Co. v. Industrial Commission. (Ills.) 44

(4). Injury arising out of and in course of employment.

Applicant has burden of proof, but evidence sufficient to make reasonable person conclude applicant was injured while performing duties is sufficient. Swift & Co. v. Industrial Commission. (Ills.) 35
Where injuries were sustained in a fight, evidence held to sustain finding that altercation grew out of matters connected with work and was not purely a personal one entirely outside scope of employment. Swift & Co. v. Industrial Commission. (Ills.) 35
Under evidence, held employer and deceased employee were under act and that accident arose out of employment. State ex rel. Gt. North'n Exp. Co. v. Dist. Ct. of Ramsey Co. (Minn.) 262
Compensation for death of servant not to be allowed unless testimony fairly gives rise to reasonable inference that death was attributable to injuries received—not essential to right of recovery that petitioner establish injuries as proximate cause of death, it being sufficient if they were producing cause—evidence held to sustain finding that death on certain date was caused by injuries received year and two months before Lundy v. Geo. Brown & Co. (N. J.) 119
Finding of board that employee who suffered sunstroke had no opportunity to escape effects of exposure before collapse, held warranted by evidence. McCarthy's Case. In re Town of Danvers. In re Employers' Liab. Assur. Corp. (Mass.) 96
Where deceased, drowned, was pipe fitter about furnaces in houses on a slip connecting with river, evidence held not to warrant conclusion that accident arose out of employment—burden is on applicant to prove that accident arose out of employment by evidence and not based on conjecture or surmise. Wisconsin Steel Co. v. Industrial Commission (Ill.).. 168
Evidence held to warrant conclusion that abscess resulted from injury. G. H. Hammond Co. v. Industrial Commission (Ill.) 176
To sustain decree of award, must have been competent legal evidence of death or disablement, result of accident arising out of and in course of employment—finding of commissioner that decedent sustained injury rather than died of disease held supported by evidence—finding that injury arose out of employment held sustained by evidence. Mailman v. Record Foundry & Machine Co. (Me.) 205
To prove accidental death, not necessary to negative every other possibility; proof need not be direct and positive but by circumstances—where cook fell overboard from wharf to which his boat was moored, evidence held to sustain finding of accidental death. Westman's Case. (Me.) 213
Where decedent was employed as gatekeeper on a highway, held under evidence that he was employed by defendant and was injured in course of

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employment—where decedent suffered accidental injury to foot, held under evidence that death resulted from accident. Doherty v. Grosse Isle Tp. (Mich.) 222
In action on death of metal polisher employed by automobile company, held there was some evidence accident arose out of employment. Zoladtz v. Detroit Auto Spec. Co. (Mich.) 259
Evidence held to support determination of commission that death resulted solely from intoxication. Trouton v. M. J. Sheehy Ice. Co. (N. Y.) 292
Whether remote cause of death was injury from lifting; evidence held to sustain award in view of presumption under act. Folts v. Robertson (N. Y.). 429
Decision of board that woman was entitled to compensation for husband's death as result of accident in course of employment, held supported by evidence that bruised body was found under wheels of his wagon, that he was sober, and report of coroner's physician stated death probably due to injuries. Leary v. McIlvain (Pa.) 453
Award by referee, confirmed by board and lower court, will be affirmed where evidence supports findings that lineman's fall and injuries were followed by pneumonia causing death—that physician examining such lineman failed to discover fractured rib, did not detract from weight to be given undisputed fact that he received chest blow when he fell, followed by continuous pain resulting a weak later in death from pneumonia. Murdock v. New York News Bureau (Pa.) 451
Evidence held to show teamster's injury arose out of employment. Heinze v. Industrial Comm. (Ill.) 361
Where boy was employed as water carrier on building under construction, evidence held to afford inference for board to draw that fall and death resulted from accident while in master's business. Gabriel v. A. J. Smith Const. Co. (Mich.) 504
In action for compensation for death caused by ashes found in stomach of one employed in removing ashes from pit under burner, award will be vacated where inference that ashes were taken into system by decedent with suicidal intent is as least as reasonable as that they found entrance accidentally. Chaudier v. Sterns & Culver Lumber Co. (Mich.) 508
Commission is not bound to decide, in accordance with opinion evidence as to speed at which employee drove auto by overturning of which he was killed; it is its duty to pass on evidence and decide fact—circumstantial evidence such employee was exceeding speed limit held insufficient to justify annulling of Board's award as unsupported by evidence. U. S. Fid. & Guar. Co. v. Indust. Acc. Comm. (Cal.) 591
Findings of commission employee was injured in course of employment by blow on neck causing paralytic stroke, held supported by evidence of attending physician. Murray City v. Indust. Comm. (Utah) 647

(5). Dependents.

Findings of trial court that decedent met death while not engaged in course of employment but when furthering personal interests held sustained by evidence. State ex rel Niessen v. Dist. Ct. of Ramsey Co. (Minn.) 109
Evidence held to support findings of board that earnings of decedent's stepmother were merely sufficient for her own support and that decedent, feeling obligation, made certain monthly payments for support of half brother. O'Flynn's case. (Mass.) 105
Testimony of deceased's brother as to letters received from parents in Italy stating their dependency upon remittances sent by brothers held no evidence of dependency upon deceased—so called certificates of "mayor" and "official" of town in Italy as to dependency held insufficient. Pifumer v. Rheinstein & Haas, Inc. (N. Y.) 136
In claim for compensation for death of minor daughter, evidence held not to show mother, claimant, dependent on earnings of decedent. Frey v. McLoughlin Bros., Inc. (N Y.) 133
Finding of commission that mother receiving $50 per month from deceased was partially dependent to extent of 56% of total dependency held unsupported by evidence. Rock Island Bridge & Iron Works v. Industrial Commission. 33
Evidence held to support finding that claimant was living with deceased as wife at time of death and dependent. Doherty v. Grosse Isle Tp. (Mich.) 222
In absence from evidence that deceased son either wholly or in part supported parents during year prior to accident, award to parents will not be sustained. Profeta v. Retsof Mining Co. (N. Y.) 444
Statement of "officer in charge" as to birth of decedent and claim of dependency by alleged parents is not competent evidence, certified copy of record being essential. Bonnano v. Metz Bros. Co. (N. Y.) 427
Evidence held insufficient to show that wife claiming compensation for death of husband, had deserted him. James Black Dry Goods Co. v. Iowa Indust. Com'r (Iowa) 379
Evidence held insufficient to show deceased employee's parents living in foreign country were dependent upon him—necessary to establish by competent evidence that claimants were dependents. Bonnano v. Metz Bros. Co. (N. Y.) 427
In action by parents residing in foreign country for death of son, evidence held sufficient to show he had contributed to support for one year prior to accident. Drummond v. Isbell-Porter Co. (N. Y.) 535

(6). Compensation.

Under evidence, held that injury was ascertainable by objective examination within act. Goodwin v. Cudahy Packing Co. (Kan.) 192

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Held that sum allowed for medical expenses was supported by evidence. Villalobos v. Cudahy Packing Co. (Kan.) 385
Evidence sustains finding that employee met death in course of employment—children under 16 conclusively presumed dependents and where father had deserted the deceased mother several years before, children are "orphans" for purpose of fixing award. State ex rel Radisson Hotel v. Dist. Court of Hennepin Co. (Minn.) 418
Evidence of insurer under act, held sufficient to show lawful claim had been made by injured employee and paid by insurer to entitle it to be subrogated to employee's rights against party causing injury. Royal Indem. Co. v. Midland Counties Pub. Serv. Corp. (Cal.) 689

§ 406. DEPOSITIONS.

Averments in motions to take depositions are not evidence and cannot be taken as true. Perotti's Case (Mass.) 391

§ 408. —— IN GENERAL.

Court has by implication power given board to approve agreed lump sum settlement and to review, terminate, diminish or increase award. U. S. Fid. & Guar. Co. v. Davis (Tex.) 310

§ 409½. ——

Whether injury is accident is mixed question of law and fact which becomes question of law when facts are ascertained or determined. Westman's Case (Me.) 213

§ 410½. ——

Finding that evidence fails to prove employee died as result of accident arising out of employment is in effect finding he did not die from such cause and cannot be set aside. State ex rel. Rinker v. Dist. Ct. of Pennington Co., 14th Jud. Dist. (Minn.) 264

§ 411. —— JUDGMENT OR DECISION.

Form of judgment proposed by employee embodying provisions of act held proper with modifications—judgment should provide for issuance of executions to collect award. U. S. Fid. & Guar. Co. v. Davis (Tex.) 310

411½. ——

Where in course of trial, it was claimed that injured employee held ankle stiff purposely and, over defendant employer's objection, two jurors personally examined ankle, and court refused defendant's request that jury be discharged, held that this was within discretion of court, that there was no error in denying new trial, nor abuse of discretion in such refusal. Mischlich v. Morris & Co. (Kan.) 383

§ 412. —— APPEAL OR OTHER PROCEEDING FOR REVIEW.

Findings of fact made by trial court in proceedings under Act are not conclusive but will be reviewed on certiorari to extent of determing whether supported by evidence—question presented on such review is of law and in decision court will be guided by general rule—if reasonable minds may reach different conclusions, question of sufficiency of evidence becomes one of fact, and findings of trial court will be sustained. State ex rel. Niessen v. Dist. Ct. of Ramsey Co (Minn.) 109
Finding that evidence fails to prove employee died as result of accident arising out of employment is in effect finding he did not die from such cause and cannot be set aside. State ex rel. Rinker v. Dist. Ct. of Pennington Co., 14th Jud. Dist. (Minn.) 264
On appeal, findings of fact in primary court are conclusive, if there be any evidence to support. Jenson v. F. W. Woolworth Co. (N. J.) 421
Trial court's finding of fact, based upon sufficient though conflicting testimony, that claim was not made within three months, is conclusive—errors concerning admission and exclusion of evidence which relate to alleged injuries for which no action can be maintained need no attention on appeal. Jacobs v. Hamilton Coal & Merc. Co. (Kan.) 496
Record, being confessedly to be treated as if no motion for new trial had been filed, presents neither general findings nor ascertained and agreed facts, claims touching excess of judgment, failure to submit to surgical operation, and objective character of injury, involving examination of conflicting evidence, cannot be considered. Close v. Lucky O. K. Mining Co. (Kan.) 492
Finding that lime was splashed in mason's eyes by fellow workman, injuring both eyes, held sustained by evidence. Zinken v. Melrose Granite Co. (Minn.) 614

§ 415. RECEPTION OF EVIDENCE.

Case under act, heard before referee, without notice to insurance carrier and without its being represented or given opportunity for cross-examination and introduction of testimony, should be reopened unless there is no possibility of changing result—insurance carrier, not notified of and not represented at the hearing, is not entitled to reopening on ground that deposition introduced was inadmissible as hearsay, where i did not offer to rebut the matters therein contained. Ocean Acc. & Guar. Corp. v. Indust. Acc. Comm. (Cal.) 477
Commissioner had power to take notice of scientific authority and data in

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reaching conclusion. Chiulla de Luca v. Board of Park Com'rs. City of Hartford (Conn.) 595

§ 416. —— REPORT AND FINDINGS OR AWARD.

Board must find as legal basis for award that claimant was employee, that injury was received by accident, that it arose out of and in course of employment, its character and extent, and claimant's average weekly wage. Muncie Foundry & Machine Co. v. Thompson. (Ind.) 56

After hearing by full board, an award made and signed by only a majority is binding. Root Dry Goods Co. v Gibson (Ind.) 49

Commission need not formulate findings except in case which are appealed. In re Behrens. (N. Y.) 282

Though there is no contest between dependents as to receipt of compensation, where payment is not voluntary and commission must determine compensation, it must also designate those entitled to same. Paul v. Industrial Comm. (Ill.) 371

Award against employers using two different partnership names is not rendered invalid by the addition of descriptive partnership name. Heinze v. Industrial Comm. (Ill.) 861

Order of board awarding compensation to injured employee in accordance with agreement between him, employer, and insurer, held inconsistent with return of board of writ of certiorari sued out by employer and insurer to review reciting that order meant case should not be finally closed, but be held open for developments. Rudiski v. Detroit Wire Spring Co. (Mich.) 396

That award was made by only one of commissioners does not affect validity where made from schedule regularity adopted by whole commission. Foster v. Indust. Ins. Com. (Wash.) 458

Contention that there was no evidence to sustain referee's conclusion that death was result of accident, raised question of law which board had power to d termine under ac. upon consideration of legal adequacy of testimony taken before referee. Murdock v. New York News Bureau (Pa.) 451

Board's award of sum per week for specified period and fixing amount already due at time of award, must be considered not lump sum award but weekly payment award, reviewable and not res adjudicata. Shaffer v. D'Arcy Spring Co. (Mich.) 406

Award for employee's death from sunstroke is not justified where commission does not find he met death through exposure to heat more excessive than that to which others were subjected or through special hazard of employment. Brezzenski v. Crenshaw Engineering Co. (N. Y.) 540

Where defendant railroad contended injury occurred while employee was engaged in interstate commerce, referee should have made finding on such question—where referee concluded it was immaterial and failed to find, board upon appeal should have held conclusion error and either made findings upon hearing de novo or sent record back to referee for finding. Reilly v. Erie Ry. Co. (Pa.) 639

Board cannot reverse award upon appeal from referee's findings of fact without hearing de novo. Tigue v. Forty Fort Coal Co. (Pa.) 751

Notice to or knowledge of insurance carrier of agreement for lump sum settlement presented to board for approval, is not contemplated by act and want of knowledge is not ground for vacating order of settlement. Hartsock v. Long (Ind.) 706

Hearing de novo by board is essential whenever intention is to disturb findings of fact, and board considering report of referee had no power to substitute own inferences and deductions for those upon the record. Where referee found employee's death in course of employment was due to rupture of aorta caused by vomiting probably due to gases, smell or fright, board without hearing de novo had no power to reach different conclusions or reverse referee on theory of his error in law in drawing conclusions different from those which would have been made by board. Clark v. Lehigh Valley Coal Co. (Pa.) 747

§ 417. —— REVIEW BY COURT IN GENERAL.

(1). Nature and form of remedy.

On appeal by either party from award of commissioner, district court of county where employee could sue employer at time of injury, is proper court to which case should be submitted. Globe Indemnity Co. v. Larson (Neb.) 520

(8.) —— Certiorari.

Return to writ of certiorari commanding Commission to certify to court complete record of proceedings in a decision must show that notice was given employer and must contain testimony upon which decision was based Tazewell Coal Co. v. Industrial Commission. (Ills.) 41

Circuit court may review by certiorari without necessity of review of decision of arbitrator by Commission. Jakub v. Industrial Commission. (Ills.) .. 153

Decision of commissioner of arbitration committee on fact in controversy is reviewable by certiorari. James Black Dry Goods Co. v. Iowa Indust. Com'r (Iowa) 379

Question whether actions amounted to wilful misconduct goes to Commission and is reviewable on certiorari. Hyman Bros. Box & Label Co. v. Industrial Acc. Comm. (Cal.) 348

(8¼). Decisions reviewable.

Notice sent by commission to self-insurer under statute, requiring present

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value of an award of weekly compensation be paid into special fund under act, pursuant to a general resolution of the commission, is not an award or decision of the commission within act, and is not appealable. Sperduto v. N. Y. C. Interborough Ry. Co. (N. Y.) 123

(3¾). Right of review.

Annulment of award by commission, where based upon opinions of physicians not part of record at hearing, after hearing was closed, without knowledge of claimant, opportunity to cross-examine or be heard, was error. Fischer v. Genessee Const. Co. (N. Y.) 279

Insurer which voluntarily contested claim of decedent's brothers was not bound by board's final award and has appeal where board did not direct payment to brothers nor find them beneficiaries but merely fixed award and directed payment to "legal beneficiaries" and where there was no agreement to be bound by action of board. American Indemn. Co. v. Zyloni. (Tex.) 315

(3¾). Proceedings for appeal or other form of review.

Though no notice of filing of award was given and notice that award had been made contained no copy thereof, where appeal was taken, commission cannot complain of own omission. In re Behrens. (N. Y.) 282

(4.) Presentation and reservations of grounds of review.

Where claim that decedent was casual employee was concededly not properly raised before board nor passed upon, question is not properly before court for review. Doherty v. Grosse Isle Tp. (Mich.) 222

Where claimant, though attention was called to depositions, chose to go before single member of board without asking for taking of deposition, question whether there was unreasonable refusal by board to make such request, is not presented. Perotti's Case (Mass.)..... 391

(4½).

Commission has power after appeal to open proceedings and receive further testimony and should then make and file another award or decision, and appeal should be taken therefrom. In re Behrens. (N. Y.) 282

(5). Trial or review.

Agreement and order for lump sum settlement will not be set aside and vacated in absence of showing fraud, mistake or gross irregularity. Hartsock v. Long (Ind.)..... 706

(6). —— Questions of law.

Findings of essential fact in favor of claimant by chairman of commission without proper evidence is error of law reviewable by court. Mailman v. Record Foundry & Machine Co. (Me.) 205

(7). —— Questions of fact.

Questions of dependency within act and its extent are questions of fact and if evidence tends to sustain, courts cannot interfere with commission's decision—finding of commission that employee's mother was partially dependent upon him, a question of fact, held supported by evidence and not reviewable. Rock Island Bridge & Iron Works v. Industrial Commission. (Ills.) 33

Objection of insufficiency of evidence to support finding of commission will not be sustained where some competent evidence supports each ultimate fact upon which award is based. Root Dry Goods Co. v. Gibson. (Ind.) 49

Findings of commission as to date of filing claim could not be reviewed or set aside on question of fact where justified by evidence and personal examination, award by commission for injury could not set aside by court as to amount or extent of injury. Heed v. Industrial Commission. (Ills.) 27

Finding of commission will not be set aside by court if warranted by evidence. Swift & Co. v. Industrial Commission. (Ills.) 35

Where evidence fairly tends to support, decision of Board will not be reviewed by court—court has no right to pass upon the preponderance of evidence regardless of mistakes of commission—in determining whether evidence sustains finding of commission court will reject testimony contrary to known natural law but mere improbability or repugnance to other evidence does not authorize court to say it should have been disregarded. Joseph Halstead Co. v. Industrial Commission. (Ills.) 24

Where evidence supports finding of board on question of fact, court cannot set finding aside. Emach's Case. (Mass.) 94

Where circumstances of accident were known to employer or agent and where commission found that notice was given, supported by evidence, it is conclusive upon appeal. Swift & Co. v. Industrial Commission. (Ills.) .. 163

Where evidence tends to show notice was given, award of commission will not be disturbed by court despite opinion that finding was contrary to weight of evidence. G. H. Hammond Co. v. Industrial Commission. (Ills.) 176

Chairman of commission is trier of facts and his decrees, in absence of fraud, are final—court will review his reasoning as to effect of or inference from evidence, but in absence of fraud will not review findings as to credibility and weight of evidence—if state of facts is shown to be more consistent with his findings than any other theory, supported by inferences from acts, appeal cannot be sustained. Mailman v. Record Foundry & Machine Co. (Me.) 205

To make successful challenge on appeal of finding of commissioner on question whether injury arose out of employment, must be shown as question of law, whether there was evidence before commissioner on which decision may stand so firmly as to make it final. Westman's Case. (Me.).. 218

On a matter of fact, conclusion of board is final and cannot be reversed unless quite unsupported by evidence. Amodio's Case. In re John S. Lane & Son. In re Royal Indemnity Co. (Mass.) 221

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Where decedent was employed as gatekeeper on highway, held that court on appeal could not say that finding of board that accident arose out of employment was without competent evidential support. Doherty v. Grosse Isle Tp. (Mich.) 222
It is not province of court on appeal from order of commission refusing award by reason of intoxication, to consider the facts, except in determining questions of law. Trouton v. M. J. Sheehy Ice Co. (N. Y.) 202
Weight to be given hearsay evidence is for commission—commission's finding that relation of employer and employee existed is conclusive. Perry v. Industrial Acc. Comm. (Cal.) 355
Findings of fact by commission, having competent supporting testimony, are conclusive. Industrial Comm. v. Johnson (Colo.) 355
Finding by commissioner as to existence of relationship of employer and employee and as to whether injuries arose out of employment, erroneous only because against weight of evidence, will not be set aside in certiorari proceedings as in excess of jurisdiction. American Bridge Co. v. Funk, Indust. Comm'r (Iowa.) 374
Questions of commission's jurisdiction may be reveiwed and weighed to determine whether it has jurisdiction to apply act in given case—whether or not employer has elected to operate under act is question of fact. Paul v. Industrial Comm. (Ill.) 371
Whether employee, shot by another, received injuries within employment or by voluntary act of assailant, held question of fact for board. Marshall v. Baker-Vawter Co. (Mich.) 399
On certiorari to board, court will not review finding of fact nor weigh evidence where there is evidence to sustain facts. Shaffer v. D'Arcy Spring Co. (Mich.) 406
Award for permanent partial disability from loss of finger by amputation at distal joint, an injury not specified in act, made according to schedule adopted by commission, held not a capricious and arbitrary award reviewable on appeal. Foster v. Indust. Ins. Comm. (Wash.) 458
Finding by referee and board that workman at time killed was employee and not independent contractor, is conclusive and not reviewable on appeal. Belmonte v. Connor (Pa.) 450
Decision of board is final on questions of fact as to extent of dependency where no presumption applies, and is not open to revision. Perotti's Case (Mass.) 391
Award of commission will be affirmed on appeal where there is evidence to support finding upon which based. Abromowitz v. Hudson View Const. Co. (N. Y.) 538
Finding of fact by referee, approved by board, to effect that deceased workman was engaged in course of employment at time of fatal accident, will not be reviewed by court. Gallagher v. P. M. Walton Mfg. Co. (Pa.) 556
In action for death of section hand from poison ivy while cutting weeds on right of way, where there is evidence to sustain finding of commission that deceased was not engaged in interstate commerce, it will not be disturbed. Plass v. Central New Eng. Ry. Co. (N. Y.) 527
Circuit and Supreme Courts can only pass on questions of law and cannot reverse award of commission for insufficiency of evidence, unless there was no competent evidence in record to support. Spiegel's Housefurnishing Co. v. Indust. Comm. (Ills.) 481
Amount contributed by deceased minor employee to partially dependent mother during 12 calendar months preceding injury and death, held question of fact on which finding of board is final. Freeman's Case—In re Automatic Time Stamp Co.—In re Amer. Mut. Liab. Ins. Co. (Mass.) 498
Board is trier of facts, and it is not for court to analyze, discuss or pass upon the arguments of counsel in support of respective theories as to how deceased was killed, if facts give opportunity for board in its discretion to infer death resulted from accident in course of employment. Gabriel v. A. J. Smith Const. Co. (Mich.) 504
Question whether defendant railway company and plaintiff at time of injury were engaged in interstate commerce, when testimony raises issue of fact, is for jury—where record shows sufficient testimony that both plaintiff and defendant were so engaged to authorize submission to jury, held court committed no error in overruling motion for directed verdict. St. Louis & S. F. Ry. Co. v. Fraser (Okla.) 632
Finding by board that employee died of natural causes and that there was no evidence there had been "any accident at all" is conclusive upon court on appeal. McGurrin v. Hudson Coal Co. (Pa.) 641
Appeal to superior court from finding and award of commissioner is original application invoking exercise of judicial power and if finding and award are within his powers and not unreasonable, his decision must stand—finding of commissioner that in case of thunderstorm there is a greater danger in open or under tree than in house must stand as consistent with evidence and not contrary to reason. Chiulla de Luca v. Board of Park Com'rs City of Hartford (Conn.) 595
Finding of board against employer's contention deceased was engaged in interstate commerce is conclusive on court of common pleas. Hancock v. Phila. & Read'g Ry. Co. (Pa.) 638
In suit to review award of commission, it must be to review error of law and not of fact. Raulerson v. State Industrial Comm. (Okla.) 725

(8). —— Harmless error.

Allowance of hearsay evidence by commissioner does not require court to

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reverse his decree, unless based on such incompetent testimony. Mallman v. Record Foundry & Machine Co. (Me.) 205
Where employee was killed by strikers, it was error to prove by parol the contents of letter received by deceased from union demanding that he sign to prevent strike. It was not prejudicial error to admit opinions that deceased was protecting employer's life and property, where there was sufficint competent evidence. Baum v. Industrial Comm. (Ill.).... 357

(9). Determination and disposition of cause.

Where testimony taken on reconsideration after appeal from first award has no bearing on pivotal point, appeal from first award will be considered though there is no appeal from that made on reconsideration. In re Behrens. (N. Y.) 282
Use of sarcasm, intimidation etc. by deputy commissioner conducting investigation and examining witnesses, manifesting bias and prejudice, requires reversal of award. In re Vissaggio. In re N. Y. Consol. Ry. Co. (N. Y.) 285
Under act, it was error for court, on affirming commission's award, to direct payment and order execution thereon. Baum v. Industrial Comm. (Ill.).. 35.
On review by certiorari, court has authority only to affirm findings and award of commission, or to set them aside and enter decision justified by law, or remand, but it cannot enter money judgment and order execution. Otis Elevator Co. v. Industrial Comm. (Ill.)..... 364
Where manifest injustice would result from weekly payment, district court, on review of award of weekly compensation, trying case denovo, may give gross award in case of death of employee having wife and two children of school age and no earning capacity. Texas Employers' Ins. Ass'n v. Boudreaux (Tex.)..... 563
In appeal from award of commissioner, district court has authority to hear as suit in equity and enter final judgment, and should allow such additional compensation and "waiting time" as evidence of continuing disability shows entitled to. U. S. Fid. & Guar. Co. v. Wickline (Neb.).... 618
On appeal from award of board, only findings and conclusions are before court for review, and in absence of findings upon controlling issues, it should remand to board instead of itself deciding issues upon evidence. Reilly v. Erie Ry. Co. (Pa.)..... 639
Implied contract for deduction for deceased's tools and supplies in determining wages, may be inferred from conduct of parties and is question of law for court, if ascertained facts are sufficient and, if not, to be remanded to board for finding. Reitmyer v. Coxe Bros. & Co. (Pa.)..... 644

§ 418. —— REVIEW OF JUDGMENT OF COURT ENTERED ON AWARD OF BOARD OR COMMISSION.

(1). Nature and form of remedy.

Statutory right to have final judgments in civil actions vacated in practice is limited to common law proceedings and does not extend to proceedings under act. Sterling v. London Guar. & Acc. Co. (Mass.)..... 610

(2). Decisions reviewable.

Order to circuit court quashing record and remitting case to commission for further proceedings and not attempting to fix rights of parties, is not "final order" reviewable by Court. Peabody Coal Co. v. Industrial Commission. (Ills.) 30
Where claim by widow was voluntarily settled pursuant to provisions of act and district court approved, held Supreme Court was without jurisdiction of appeal. Bach v. Interurban Ry. Co. (Iowa)..... 708

(5). Review.

Discretion of district court in compensation award in gross on trial of cause de nova, on review of award of weekly compensation by board, will not be disturbed on appeal. Texas Employers' Ins. Ass'n v. Boudreaux (Tex.) 563

(6). —— Questions of law or fact.

Whether willful misconduct with intent to injure himself, or intoxication was proximate cause of injury were fact questions for tribunals under compensation act, and where reasonable minds may draw different conclusions on evidence, court will not interfere with their findings. Pierce v. Bekins Van & Storage Co. (Ia.) 78
Extent of dependency of step brother was for board to decide as question of fact, and if supported by evidence, court cannot disturb. O'Flynn's Case. (Mass.) 105
Review by supreme court is on certiorari only; may not consider the testimony, but is authorized to examine findings and reasons stated in adjudications of referee, board, and court below, to determine whether decision is founded upon proper basis. Murdock v. New York News Bureau (Pa.) 451
Under act, where case is heard in district court, where there is competent evidence sufficient to sustain finding, judgment will not be set aside on appeal unless clearly wrong. Anderson v. Kiene (Neb.)..... 722
Where commission found servant did not come to death by injury in course of employment, and district court sustained finding, supreme court cannot interfere if finding is supported by credible and substantial evidence. Youngquist v. Industrial Comm. (Colo.) 690

(7)

Judgment entered upon the going down of remittitur from Supreme Court, that defendant Department make such order for compensation to plain-

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tiff employee as will reasonably cover his difference in wage earning power, held to require award be in the proportion which new earning power bears to old and not for full difference between old and new. Parker v. Indust. Ins. Dept. (Wash.) 659

§ 419. PROCEEDINGS TO INCREASE, DIMINISH, OR TERMINATE COMPENSATION.

Award of weekly compensation under act is in effect a judgment and cannot be changed by requiring payment of present value into a special fund without notice and opportunity of hearing being given interested parties, nor after giving such notice and opportunity, can it be vacated or modified by general resolution. Sperduto v. N. Y. C. Interborough Ry. Co. (N. Y.) 123

Where evidence, on petition for permission to cease payments to injured employee, tends strongly to prove employee has recovered, his refusal to submit to objective examination demands suspension of right to compensation. Rose v. Desmond Charcoal & Chem. Co. (Mich.) 338

Where injured employee and employer entered agreement, approved by board, and employer's petition to set it aside was denied by board and resumption of payments ordered, appeal cannot raise question that court has sole power to enforce award—such agreement cannot be set aside at instance of employer and insurance carrier merely to enable subsequent contentions that injury did not arise out of employment. Home Packing & Ice Co. v. Cahill. (Ind.) 184

Where injured employee has so far recovered as to be able to work for another employer, order of board, refusing to reduce compensation was unwarranted. Moshinski v. Kay Salt Co. (Mich.) 229

Upon petition before board to reopen case, it was proper upon due notice and opportunity to present testimony, not to limit to matter of reopening but to consider right to additional compensation—employee who has given settlement receipt in full, has burden of showing he is entitled to reopen case and to further payment—employee's allegation of duress, fraud and misrepresentation inducing his signing of acknowledgement receipt held not supported by evidence—evidence held to support findings that injuries were attributable to accident in question. Weidner v. Northway Motor Mfg. Co. (Mich.) 354

Insurance carrier, assenting to award by admitting injury was cause of accident not permitted review upon appeal—Commissioner's power to change award is not arbitrary but judicial discretion to be exercised only in interest of justice, upon new evidence of clear mistake of fact, cumulative evidence bearing negatively upon question of fact already amply proved being insufficient—where annulment of award was based on opinions after close of hearing, by misinformed physians who had not examined employee, and upon application of insurance carrier who had admitted injury was cause of accident, annulment was arbitrary and not authorized. Fischer v. Genessee Const. Co. (N. Y.) 379

Where injured employee was not employed by year, but for short definite period at $3 per day, board properly determined after agreement between commissioner of insurance and employee for compensation at $10 per week that average weekly wage was less than $4—where board approved such agreement, so long as the matter was depending before it, it had the power subsequently to limit payments to average weekly wage. Kirchner v. Michigan Sugar Co. (Mich.) 402

Where injured employee refused to attend meeting of compensation committee organized by employer, and to accept their award, subsequently bringing action to review and cancel the award on ground of its inadequacy and his increased subsequent incapacity, held that court had jurisdiction to review and consider competent evidence on points in complaint—evidence held to support court's judgment that such award was grossly inadequate, although committee had acted in good faith, and awarding lump sum. Villalobos v. Cudahy Packing Co. (Kan.) 385

§ 420. COSTS, FEES, AND EXPENSES.

Any liability of employer to attorney of injured employee exists under general statute as to attorney's lien—where claim of injured employee was settled without action or proceeding and the money paid, employee's attorney could have no lien on money—notice by employee's attorney to employer is not notice to insurer. Kratz v. Holland Inn (Iowa) 487

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